Jurisdictional Statement

Office-Supreme Court, U.S.
FILED
AUG 7 1981
ALEXANDER L. STEVAS,
CLERK

81-404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. _____

COURT HOUSE PLAZA COMPANY,
Appellant,

v.

CITY OF PALO ALTO ET AL.,
Appellees.

On Appeal From The Supreme Court Of California

JURISDICTIONAL STATEMENT

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August 1981

QUESTIONS PRESENTED BY THE APPEAL

1. Whether a state court can refuse to provide equitable relief to an aggrieved property owner and thereafter with impunity deny the constitutionally mandated remedy of just compensation when a city has

   (a) passed an ordinance permitting construction of a ten-story office building in two phases in accordance with demand under a development schedule;

   (b) issued use and building permits for the construction of the first four floors of a ten-story office building which were constructed at an additional expense of $450,000 to accommodate an additional six floors

   (c) issued use and building permits for the construction of the additional six floors for phase 2 and property owner purchased the steel and elevators for the additional six floors but was unable to proceed because of inability to obtain long term financing so that the building permit and use permit for phase 2 lapsed.

   (d) passed a high-rise ordinance after the first phase consisting of four floors of the ten-story office building had been built in the first phase limiting the height of all buildings to 50 feet other than in P-C districts.

   (e) permitted its city officials to refuse to act on use permit and building permit applications for construction of the additional six stories for phase 2 and thereby forced property owner to seek an extension of the development schedule;

   (f) refused to recognize that vested rights can accrue for a vertically phased high-rise building;

   (g) refused without a public hearing to grant an extension of the development schedule where zoning code provided that for "good cause" shown by the proper-

ty owner a change in the time schedule for development could be made without a public hearing to cause a second rezoning or a reversion in zoning resulting in a P-C District which only permits a four-story building but where the zoning code prohibits such action without a public hearing and findings.

(h) accomplished indirectly that which it could not do directly; that is, destroy the property owner's vested rights and an investment of approximately $1,000,000 which it had expended in phase 1 and phase 2 for the additional six stories of the ten-story office building

(i) in the past granted every other request for an extension of a development schedule for a P-C District.

2. Whether money damages for inverse condemnation for a property owner who has been aggrieved by oppressive regulatory activity under the guise of the police power is mandated by

(a) sound public policy, as an indispensable check against the arbitrary and capricious excesses of local government land use regulation allegedly undertaken under the police power;

(b) the express guarantees of the Fifth and Fourteenth Amendments to the United States Constitution; and

(c) an unbroken line of federal decisions interpreting and applying the United States Constitution.

3. Whether a purported invalidation remedy proffered by the California state courts is a constitutionally adequate substitute for just compensation where the conduct complained of by property owner is not a single regulation, but a continuing course of conduct, including arbitrary, capricious and conspiratorial planning and zoning activities.

4. Whether the purported social desirability of unfettered planning discretion or the potential inhibiting financial force of inverse condemnation damages permit the California courts to deny a property owner just compensation for the taking of private property for public use as guaranteed by the Fifth and Fourteenth Amendments to the United States Constituion.

5. Whether vested rights can only accrue to a property owner when there is a revocation of an existing permit under which construction is being undertaken.

6. Whether a property owner in connection with a denial of an extension of the development schedule is entitled to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Supreme Court of the State of California.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

1. A Memo Of Decision (App. A) was entered on May 11, 1978 by the Santa Clara County Superior Court following a trial without a jury followed by Findings of Fact and Conclusions of Law (App. A) and a Judgment (App. A) filed on July 10, 1979 denying a writ of mandamus sought by Court Plaza Company ("Property Owner") directing appellees to issue use and building permits for the construction of six additional floors to the first four floors constructed under phase 1.
2. An opinion (App. B) of the California Court of Appeal, First Appellate District, Division Three was filed on March 11, 1981 affirming the denial of the writ of mandamus. The decision is reported at 173 Cal. Rptr. 161, 117 C.A. 3d 871.

GROUNDS ON WHICH JURISDICTION ON THIS COURT IS INVOKED

A timely appeal was filed by Property Owner on August 1, 1978 from the judgment of the Santa Clara County Superior Court to the California Court of Appeal. A petition for rehearing was filed on March 26, 1981 which was denied on April 10, 191 (see App. B). A petition for hearing was filed with the California Supreme Court on April 20, 1981 which was denied on May 13, 1981 (see App. C). A notice of appeal (App. D) to this Court was filed in the California Court of Appeal, First Appellate District, Division Three (the Court having possession of the record of this case), on August 5, 1981 appealing from the final judgment of the California Supreme Court. This appeal is being timely docketed in this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). Property Owner has challenged the regulatory actions of the City of Palo Alto on the ground that the effect of those actions has been to deny Property Owner all use of its property rights in the air space above the existing first four-stories of a ten-story building. Property Owner has vested rights in this air space for an additional six stories to complete the ten-story building. The city's actions constitutes a taking of property of Property Owner which requires payment of monetary compensation under the Fifth and Fourteenth Amendments to the United States Constitution. The decisions of the California state courts which are challenged herein are that regulatory (police power) actions, even those which have the effect of denying a porperty owner all use of its property can never amount to a "taking" and thus a property owner is never entitled to bring an inverse condemnation action to require the payment of monetary compensation for such actions.

Cases subtaining jurisdiction of an appeal to this Court from a state court involving issues of whether the regulatory actions of a governmental entity have amounted to a "taking" of pri-

vate property and whether the property owner is thus entitled to monetary compensation for these activities are as follows: *San Diego Gas & Electric Co. v. San Diego,* U.S. , 67 L. Ed. 2d 551, S. Ct. , (1981); *Agins v. City of Tiburon,* 447 U.S. 255, 65 L. Ed. 2d 106, 100 St. Ct. 2138; *Kaiser Aetna v. United States,* 444 U.S. 164, 63 L. Ed. 332, 100 S. Ct. 383 (1979); *Penn Central Transportation Co. v. New York,* 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

Constitutional Provisions and Ordinances

Fifth Amendment, United States Constitution:

> "nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Ordinance No. 2224 establishing a P-C District for a ten-story office building for Property Owner's property is set forth in Appendix E.

Ordinance No. 2745 to establish a 50 foot height limit in Palo Alto was passed on September 24, 1973.

The pertinent sections of the Zoning Code of Palo Alto are set forth in Appendix E.

STATEMENT OF THE CASE

By 1964 Property Owner, Court House Plaza Company had assembled a number of parcels to provide a site for a ten-story office building and the associatd parking. At Property Owner's request the City established a P-C zone by Ordinance No. 2224 (App. E) for a ten-story office building to be built in two phases with phase 1 to consist of the first four stories and a two-story parking structure with construction to commence before

January 28, 1967 and phase 2 for the six additional stories and additional levels on the parking structure with construction to begin by October 31, 1976.

Construction drawings were prepared for the first four floors with the design including a foundation and structural steel to accommodate an additional six floors. A basement was provided for the mechanical equipment which would normally be put on the roof so as to make possible the six story addition without interruption of service to the existing four stories. In addition an interior smokeproof tower which was not required for a four story building as well as two additional elevator shafts needed only for the six story addition and utility services for a ten-story building were included in the four-story design. Completion of the drawings was delayed by over three months by a dispute between city officials as to the applicable building code which was decided to be the 1961 building code which permitted use of an interior smokeproof tower.

The issuance of a use permit for phase 1 construction of the first four stories of the office building was delayed by six and one-half months by the possible condemnation of a portion of the site contemplated for the parking structure. This was temporarily resolved by permitting temporary off-street parking. Issuance of the building permit was delayed by almost a year because of the delay in issuance of a use permit and also by a delay in resolving a floor-to-floor dimension controversy involving an increase of approximately 14 feet in the height of the ten-story building.

Construction on the phase 1 four stories commenced in September 1966 and was completed by the middle of 1967 and included costs in excess of $450,000 in phase 1 to accommodate phase 2. By 1968, the four-story building was leased although it had only one elevator and temporary parking.

At this time plans were undertaken to complete the ten-story building by having the architect proceed with the preparation of

construction drawings for the additional six floors at a cost of approximately $70,000. Activities to complete construction were pushed more rapidly in 1969 in the order to have the six-story building addition built and leased before a large project including two ten-story office buildings which the city had approved within two blocks of Property Owner's project could be completed and be in competition with Property Owner for tenants.

A building permit for the six story addition was applied for on December 1, 1969 but its issuance was delayed until February 16, 1970 by a controversy between city officials as to whether an interior smokeproof tower was permitted for the ten-story building which supposedly had been resolved in Property Owner's favor at the time the first building permit issued in 1966. The dispute was resolved by the Senior Assistant City Attorney who explained the resolution in an inter-office memorandum of February 3, 1970 (Ex. 18, App. F) by stating:

> As you know, this ruling comes from this office on the basis that Ordinance 2224 contemplated the 10 story building with an interior smokeshaft and the development plan attached to the ordinance specifically shows a 10-story building with no exterior smokeshaft. This understanding was confirmed by Mr. Keithley's letter of June 4, 1965. *Therefore, it would appear that certain rights vested.* Those rights are with respect to a building with an interior smokeshaft, which building is unsprinklered. (Emphasis supplied)

An application for a use permit was made on February 13, 1970 after it was known that a building permit would issue. The issuance was also delayed by the City until March 30, 1970 because the zoning administrator insisted that an increase in floor-to-floor dimensions increasing the building height by approximately 14 feet had to be approved by the City Council.

But for the delays caused by the City, the building permit for phase 2 would have issued at least as early as December 22,

1969 when the structural steel drawings had been checked. Even though the structural steel was ordered before a building permit issued because of the long lead time, all fabrication of the structural steel took place after December 22, 1969 and 50% of the structural steel was fabricated after February 16, 1970 when the building permit did issue. If a stop work order had been entered as of February 16, 1970 approximately 30% of the cost of the steel could have been saved. Substantially all of the elevator apparatus was manufactured after issuance of the building permit on February 16, 1970.

Because of the various delays in issuance of the permits for phase 2, Property Owner was pushed into a time frame where interest rates were rapidly accelerating to a level above the maximum 10% permitted by the usury law of California which made it impossible for Property Owner to obtain financing to complete phase 2. The building and use permits for phase 2 thereafter lapsed. This meant it was necessary for Property Owner to continue to carry without return the $450,000 investment it had made in phase 1 to accommodate phase 2 but also an additional $500,000 incurred in fabrication of the steel and elevators for phase 2.

The County of Santa Clara finally commenced its condemnation suit in 1969 for a portion of Property Owner's parking parcel which was not completed until August of 1970.

The large project next to Property Owner's property was completed placing a large oversupply of office space on the market making it impossible to obtain financing to complete phase 2.

The City in the 1970's embraced an anti-high rise philosophy and in connection therewith in 1973 adopted a 50-foot height limit for all buildings except for P-C Districts and since 1973 no buildings over 50 feet in height have been built.

By early 1976 the economic climate for additional office

space in the City had improved and Property Owner filed a zone change application on June 30, 1976 to accommodate parking structures for the ten-story building to resolve the problems which had been created by the condemnation of a portion of Property Owner's parking parcel and also condemnation of another parcel. Property Owner was not advised until August 6, 1976 that the City considered the plans incomplete. Because of this delay in the zone change application, Property Owner was advised by the zoning administrator to seek an extension of the development schedule which would be adequate to solve the parking problem. Property Owner filed a request for a three-year extension of the development schedule alleging good cause which was not heard by the Planning Commission until August 25, 1976 which denied the same.

Property Owner at the time of the Planning Commission decision realized that the granting of an extension of the development schedule could be a political issue on which environmentalists could capitalize and thus had little chance of success if the denial was appealed to the City Council. Property Owner withdrew the request and decided to proceed with construction in order to meet the deadline of the development schedule. Use and building permit applications were filed on August 30 and 31, 1976 respectively. It soon became apparent that the city officials were taking no action on these permit applications with the objective to run out Property Owner's development schedule. This forced Property Owner to seek an extension of the development schedule which the city officials had every reason to believe would be denied in view of the then current anti-high rise philosophy which pervaded the City Council.

The Building Inspector had informed Property Owner that the 1968 plans would have to be submitted to an outside plan check organization although this had not been done before and even though the 1968 plans previously had been approved for the 1970 building permit for the six story addition. No such

action was undertaken by the Building Inspector. The zoning administrator stated that Property Owner in addition to actually starting construction on the six story addition also had to start construction of the parking structure before the expiration of the development schedule. This latter requirement was an impossibility because the County of Santa Clara had condemned and taken a portion of the land for the parking structure making it impossible to build the parking structure which was approved in Ordinance No. 2224.

Revised plans for the six story addition were submitted on October 15, 1976 which met the then current building codes. The Building Inspector also refused to act on those plans. The Zoning Administrator also did not act on the use permit application and considered sending the 14-foot height variation back to the city council even though a previous city council had already passed on the issue in granting the use permit for the six story addition in 1970. The building inspector refused to issue an interim building permit so that petitioner could commence construction using the steel which it had on hand.

Property Owner seeing that no permits would be forthcoming, requested only a one year extension of the development schedule. This also was rejected by the Planning Commission. The rejection was appealed to the City Council which affirmed the rejection on December 6, 1976. The City Council was advised by the City Attorney that nothing could prohibit the City Council from applying a 50-foot height limit or the environmental impact in considering whether to grant an extension of the development schedule. This denial occurred even though earlier Property Owner had been advised by the Assistant City Attorney as follows (Ex. 120, App. F)

> The lapse of the Development Plan can be prevented by applying for an extension of the Development Schedule if necessary. While this letter should not and cannot be construed as a commitment on the part of the City of Palo

Alto to grant such further extensions, inasmuch as this authority is vested in the City Council, these extensions have, in fact, customarily been granted. The reason for this is simply that the City is not any more interested than the owners in having a development remain half completed.

Property Owner filed suit in the Superior Court of Santa Clara County in the State of California on May 23, 1977 against the City of Palo Alto, the City Council, the Planning Commission and certain city officials petitioning for a writ of mandamus requesting among other things that the City issue use and building permits for the six-story addition. Trial commenced before Judge Hall on January 9, 1978 who recommended a settlement conference between the parties. When the case did not settle it was reassigned to Judge John R. Kennedy over the strong objections of Property Owner with the trial recommencing on February 22, 1978 and continuing through March 30, 1978. A Memo Of Decision (App. A) was handed down by the Superior Court on May 11, 1978 denying the petition for a writ of mandamus. Findings of Fact and Conclusions of Law were prepared by the City. Property Owner filed Objections to such Findings and Conclusions of Law and Requested Special and Counter Findings of Fact and Conclusions of Law. The trial court adopted substantially verbatim the Findings of Fact and Conclusions of Law prepared by City's attorney and filed them as its own (App. A) on July 10, 1978. A judgment (App. A) was filed on July 10, 1978.

The judgment of the trial court was appealed by Property Owner to the California Court of Appeal and was affirmed in an opinion (App. B) filed on March 11,1981. Property Owner filed a petition for rehearing which was denied on April 10, 1981 (see App. B) which was followed by a petition to the California Supreme Court which was denied on May 13, 1981 (See App. C).

HOW THE FEDERAL QUESTION IS PRESENTED

Property Owner in its petition for the writ of mandamus alleged that the City's refusal to approve an extension of the development schedule was a denial of equal protection of the laws because the City in the past had granted all other extensions of development schedules and in this case the City itself had requested delays in construction of the parking structure. The petition also alleged because of Property Owner's expenditures in phase 1 under a building permit and in phase 2 under another building permit undertook construction for the six-story addition, and thereby obtained vested rights to complete the ten-story building. The City by inaction failed to issue use and building permits forcing Property Owner to seek an extension of the development schedule which was denied and deprived Property Owner of its vested rights in the six-story addition and thereby deprived Property Owner of the lawful use of its real property. This constituted a taking by the City without compensation and without due process and "in contravention of the laws and the Constitution of the State of California and the United States of America".

Property Owner's post trial brief alleged that the actions of the City deprived Property Owner "of its vested rights and its constitutional rights to due process and equal protection as well."

The trial court's Memo Of Decision (App. A) held that Property Owner had not acquired vested rights to complete the ten-story building because there was no revocation of a building permit still in effect but did not address the due process issue. The Findings of Fact and Conclusions of Law (App. A) stated that no "fundamental vested right was ever acquired" by Property Owner and that the City's actions in refusing to issue permits and grant an extension of the development schedule were not "unreasonable, unlawful, arbitrary, discriminatory, malicious nor void, nor have such resulted in any denial of due

process or equal protection of the laws."

Property Owner in its opening brief to the Court of Appeal of the State of California urged that the refusal of the Planning Commission and the City Council to grant Property Owner an extension of the development schedule was a denial of due process and equal protection of the laws and constituted inverse condemnation without just compensation.

The Court of Appeal in its opinion (App. B) stated that while "both the Federal and State Constitutions provide that private property may not be taken or damages for public use without payment of just compensation to its owner (Cal. Const., art. I §19; U.S. Const., 5th Amend.), a 'mere diminution' in property value due to a zoning action is not compensable. *(Agins v. City of Tiburon* (1979) 24 Cal. 3d 266, 273-274, 157 Cal. Rptr. 372, affd. 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980).)"

Property Owner's petition for hearing to the California Supreme Court asserted that the denial of Property Owner's request for an extension of the development schedule constitutes a reverse or second zoning amounting to a taking or damaging of private property rather than a mere diminution in property value for which damages were due.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. Jurisdiction Should Be Granted Because of the Importance of The Issue of Inverse Condemnation Involved.

The present case clearly presents the issue of whether California under the recent ruling in *Agins v. City of Tiburon*, 24 Cal. 3d 266, (1979) that a property owner's exclusive remedy is invalidation of the zoning regulation where the zoning regulation deprives the property owner of substantially all beneficial use of the real property right and is not entitled to an award of damages in an inverse condemnation proceeding. In the case of *San Diego Gas & Electric Co. v. San Diego*, 67 L. Ed.

2d 551 (1981) this Court addressed this issue but decided that the appeal had to be dismissed because of the absence of a final judgment.

In this case Property Owner has challenged the City's actions under a zoning regulation reverse zoning or down zoning Property Owner's property by denial of a request for an extension of a development schedule in a planned community zone so as to deny Property Owner all beneficial use of the air space which was to be occupied by the six additional floors for the ten-story building approved for the planned community zone. Property Owner had expended approximately $450,000 in preparing the foundation and first four floors under a building permit to accommodate the additional six floors and had expended an additional $500,000 in fabricating under another building permit the structural steel and elevators for the additional six floors. The California courts by upholding the actions of the City under its legislative or police powers are depriving Property Owner of its property rights to the air space for the six additional floors which it obtained under Ordinance No. 2224 and upon which it relied in good faith in expending approximately $1,000,000 to complete the same thereby depriving Property Owner of all use of the air space as well as rendering substantially valueless the $1,000,000 investment except for scrap value of the steel and elevators. This is not a mere diminution in value as contended by the Court of Appeal because what has occurred is a "taking" of Property Owner's air rights for floors five through ten in promulgating the City's policy of permitting no building above 50 feet in height even though the zoning ordinance implementing such a height limit was enacted in 1973 after Property Owner had expended approximately $1,000,000 under building permits to construct the six additional floors.

The City by not acting on Property Owner's applications for permits and forcing Property Owner to seek an extension of the

development schedule which it could deny was doing indirectly that which the City knew it could not do directly, i.e., take Property Owners property without just compensation.

Since Property Owner can make no use of the air space or the six additional floors and since the California courts have refused to set aside the actions of the City in its purported exercise of its police powers, the issue is squarely presented as to whether California can deny Property Owner any monetary compensation for the loss of its property rights without violating the Fifth and Fourteenth Amendments to the U.S. Constitution.

2. Jurisdiction Should Be Granted Because of The Importance of The Vested Rights Issue Involved.

Also involved is the California court's interpretation of what can constitute vested rights which are property rights which cannot be taken away for public use without payment of just compensation. The California courts in this case have held that a property owner can only obtain vested rights where an attempt is made by a governmental entity to revoke an existing permit and where the property owner at that time is proceeding with construction under the existing permit. Property Owner submits that vested rights are not to be interpreted so narrowly and relied on the following authorities as establishing its vested rights. *Atkinson v. Piper* 195 N. W. 544 (S. Ct. Wisc. 1923); *Dobbins v. City of Los Angeles* 195 U.S. 223, 225 S. Ct. 18, 49 L. Ed. 169 (1904); *Morgan v. County of San Diego* 19 C. A. 3d 636, 97 Cal. Rptr. 37 (1971); *TransOceanic Oil Corp. v. Santa Barbara* 85 C. A. 2d 776, 194 P. 2d 148 (1948); *Kissinger v. City of Los Angeles* 161 C. A. 2d 454, 327 P. 2d 10 (1955); *Herskovits v. Irwin* 299 Pa. 155, 149 A. 195 (1930); *Glenel Realty Corp. v. Worthington* 164 N.Y.S. 2d 635 (1967); *Sakolsky v. City of Coral Gables* 151 So. 2d 433 (1963); *Lefrak Forest Hills Corp. v. Galvin* 40 A. D. 2d 211, 338 N.Y.S. 2d 932 (1972).

The City Attorney's office ruled on this question in 1970 when it issued a memorandum resolving a controversy in Property Owner's favor with respect to whether an interior smokeproof tower and an unsprinklered ten-story building could be built under the then current codes. The memorandum (Ex. 18 App. F) held that certain rights had vested for a "building with an interior smokeshaft, which building is unsprinklered." The City Attorney's office was merely setting forth the appropriate law on vested rights. Thereafter, a building permit was issued to complete the building to ten stories with an interior smokeshaft and without sprinklers.

The trial court's statement in its Memo of Decision (App. A) that the reference to an interior smokeproof tower was not intended to apply to the additional six stories is in error. Stone conceded that Property Owner had vested rights to complete the building in the manner in which it had been constructed in the first phase. The City also conceded this when it issued building and use permits in 1970 for a ten-story building with an interior smokeproof tower and without sprinklers.

The *Herskovits* case cited above involved the construction of a six-story apartment house. The developers received a permit to construct the foundation of a six-story building, and did some work to construct the foundation. They made a proper application for a permit to build the complete structure before the passage of an amendatory ordinance restricting the height of buildings to three stories. A permit was not issued. The township urged because of the subsequent enactment of the height ordinance, no right to build to a height of six stories could inhere. The Court in deciding this issue stated:

> This contention cannot be sustained.
>
> When a permit was issued for the foundation of a 'six-story apartment' building, the applicants, under circumstances such as those attending the issuance of the permit now in question, had the right to assume that, if their

> inished plans showed compliance with existing building and zoning regulations, a final permit would naturally follow for the complete structure. Here appellees proceeded accordingly, and incurred expense and legal obligations.
>
> * * * * * *
>
> a property interest arises where, after permit granted, a landowner begins construction of a building and incurs liability for future work. See, also, *Fuller v. Schwab*, 124 Mis. Rep. 659, 208 N.Y.S. 289, 290: *State v. Wisconsin Tel. Co.*, 181 Wis. 519, 195 N.W. 544. The contract entered into by appellees involved a substantial obligation on their part, and appellants cannot object that but little work was done where, as here, they have prevented furhter construction.
>
> * * * * * *
>
> *To say that under the circumstances of this case, a vested right was created in the foundations of the six-story building but not in the building itself, does not satisfy a proper sense of justice.* (Emphasis supplied)

In the *Glenel* case, prior to the date of an amendment to a zoning ordinance in reliance on four permits issued for the excavation and foundation work, developer had completed the excavationwork, had poured all the concrete for the foundations, had assumed contractual obligations aggregating $787,726 and had made payments of $212,281 on account of such obligations. The court in *Glenel* found that it was immaterial that some of these obligations and some of these payments may have antedated the permits. A substantial part of the excavation and foundation was done after the issuance of the first permit and therefore the court found that it was unnecessary to allocate the work and repayments to before and after the permit on the ground that "all the obligations may well be said to have been justifiably assumed and all the permits—whether such reliance was upon their anticipated, or upon their actual, issuance." The Court found the builder had vested rights and then stated:

> On the argument the appellant building inspector contended that such *vested right*, if any, must be *confined to the foundation only*, and does not extend to the completion of the superstructure or its use. Such an *argument is not only shocking to the sense of justice* but also leads to reductio ad absurdum. The foundation is an integral part of the whole structure; it *is the foundation*. Where, as here, the superstructure a one- or two-story 'taxpayer' and part of the basement is to be utilized for rental purposes, the foundation may be said to be a major part of the whole structure. Consequently, the vested right in the foundation must connote a vested right to the erection and subsequent use of the specific superstructure for which the foundation was designed. It is the construction of the foundation and the substantial cost thereof which establish and define the builder's vested rights in relation to the superstructure and its use, and which entitle him to complete it in accordance with the zoning ordinance in force at the time of the construction of the foundation (citations omitted)." (Emphasis supplied.)

Property Owner as in the *Herskovits* and *Glenel* cases obtained a permit for the foundations and structural steel for a basement and four stories with the capability of accommodating six additional stories which complied with all existing legal requirements and built the foundation, basement and four stories in reliance that a building permit would issue when the plans were submitted for the additional six stories. For the City to urge that Property Owner only has vested rights for a "method of construction" in the first four floors and not in the ten-story building itself also does not satisfy a proper sense of justice. The City sanctioned a ten-story building at the time of approval of Ordinance No. 2224.

Property Owner asserts that the use and building permits issued in 1970 did not lapse because Property Owner did proceed with construction of the six-story addition by having the architectural plans prepared and having the steel and elevators fabricated for the same. No vested rights have been lost by Property Owner filing for new use and building permits because Property Owner was merely following the directions of the City

and was merely taking the next steps to complete the ten-story building.

Under the authorities set forth above, Property Owner certainly obtained a vested right to complete its partially-built ten-story building when it constructed the first four floors and basement at great additional cost to accommodate the other six floors.

Since Property Owner constructed the four stories of the ten-story office building under phase 1 under valid use and building permits and incurred additional costs in the amount of $450,000 to accommodate phase 2, Property Owner had a vested right to proceed with the completion of phase 2 and it was no longer in the discretion of the City to decide whether Property Owner could complete the ten-story building as approved under the development plan in Ordinance No. 2224. The fact that the City would insist on a building permit to add the six stories does not give the City the right to deny a building permit because the height would exceed a height limit established by a zoning ordinance passed after completion of the first four floors.

In reliance on this vested right, Property Owner thereafter preared plans and specifications and procured the structural steel and the additional elevators for the six-story addition at a cost of $500,000. Because structural steel and elevators are long-lead-time items it was necessary to order them prior to making application for a building permit so that they would be available for construction when the building permit issued. A building permit expires within 120 days if work is not commenced.

The fabrication of the structural steel and elevators for the six-story addition constituted a recommencement of construction on phase 2 over and above that which had been done during phase 1. Actual construction on the site is not necessary under the authorities to constitute construction. *Morgan v.*

County of San Diego, supra; *Kissinger v. City of Los Angeles*, supra; *Glenel Realty Corp. v. Worthington*, supra; 635; *Atlas v. Dick*, 81 N.Y.S. 2d 126 (1948); *Sakolsky v. City of Coral Gables*, supra; *Clackamus County v. Holmes, Superior Court of Oregon* 508 P. 2d 190 (1973); *Elsinore Property Owners Assn. v. Morwand Homes* 286 A. D. 1105, 146 N.Y.S. 2d 78 (1955); *Herskovits v. Irwin*, supra; *City of Miami Beach v. Benbow Realty* 168 F. 2d 378 (1948); *Gulf Oil v. Vogel* 141 A.2d 237 (1958).

The application for a building permit for the six-story addition was applied for on December 1, 1969 and should have issued shortly thereafter because five of the floors were merely copies of floors which had been approved in the phase 1 plans. The City urged and the trial court found in Finding 21 (App. A) that Property Owner by a letter of September 30, 1969 to Johnson & Mape Construction Company *fully obligated* itself to pay for phase 2 development costs prior to obtaining a building permit. No contract was ever signed between Property Owner and Johnson & Mape with regard to phase 2. No fabrication of steel had taken place prior to December 21, 1969 by which time the building permit should have issued but for the delays caused by the City. Property Owner as of December 21, 1969 could have ordered Johnson and Mape to cancel the contract for the fabrication of the structural steel and would have only been liable for the nominal costs incurred by San Jose Steel up to that date if it had known that a building permit would not issue.

The City delayed issuance of the building permit until February 16, 1970 because of the smokeproof tower controversy on which the City had previously ruled in Property Owner's favor in connection with phase 1 and on which the City had ruled that Property Owner had vested rights (Ex. 18, App. F). Approximately one-half of the steel was fabricated after issuance of the building permit. Property Owner therefore acquired vested rights to complete phase 2 by this fabrication.

Glenel Realty Corp. v. Worthington, supra. If fabrication of the steel had been stopped on February 16, 1970, Property Owner could have greatly reduced its obligations.

The City urged that the 1969–1970 smokeproof tower controversy *lasted about two months* and this appears in the trial court Finding 25 (App. A). The fact is that the building permit was delayed for almost two and one-half months and during a very critical period while the structural steel was being fabricated at great cost and expense to Property Owner. The City urges that even though this delay was caused by the City, Petitioner cannot claim any vested rights with respect to the steel fabricated during this period. This Petitioner submits is grossly unfair particularly in view of the fact that the same smokeproof tower controversy had been ruled upon in Property Owner's favor in phase 1. The bona fides of the City's reasserting the smokeproof tower controversy in connnection with phase 2 certainly can be questioned. *Golisano v. Town Board of Macedon* 296 N.Y.S. 2d 623 (1968); *Atlas v. Dick*, supra.

An interim agreement for the fabrication of the elevators was not entered into until sometime after January 6, 1970. It therefore follows that all or substantially all of the work was done after a building permit should have been issued and that a major part was accomplished after February 16, 1970 when the building permit did issue. Vested rights, therefore, also flow from the fabrication of the elevators which were delivered to the building site.

In addition, since a building permit did in fact issue on February 16, 1970 for the six-story addition, all work which Property Owner had in good faith performed in the expectance of obtaining a permit automatically vested at that time. *Kissinger v. City of Los Angeles*, supra; *COS Corp. v. City of Evanston* 27 Ill. 2d 570, 190 N.E. 2d 364 (1963); *Glenel Realty Corp. v. Worthington*, supra; *Lefrak Forest Hills v. Galvin*, supra.

The trial court and the Court of Appeal (App. A & B) held that even though some steel and elevators were fabricated after the issuance of a building permit no vested rights could be obtained because Property Owner did not rely on an existing permit at time it ordered the steel and elevators. No authority is cited for this novel proposition. Property Owner submits there is none and that the law is to the contrary.

The doctrine of vested rights is based upon principles of equity and fairness. In the decision of *Lefrak Forest Hills Corp. v. Galvin*, supra, the court states:

> There is no fixed formula which measures the content of all the circumstances whereby a party is said to possess 'a vested right,' it is a term, rather, which sums up a judicial determination of that the facts of the case render it inequitable that the state impede the individual from taking certain action.

In general, the cases on vested rights hold that where a developer has furnished the municipality with information pertaining to a specific structure to be built on the land by presenting plans showing the type of building, its location and its general characteristics and there is approval of the same (as in the case by the establishment of a P-C development under Ordinance No. 2224 for a specific ten-story office building in a specific location and its uses) and the developer thereafter in good faith and belief that it can complete the building either (a) engages in substantial construction or (b) incurs substantial liabilities, that the developer obtains the right to complete the specific structure approved. *Griffin v. County of Marin* (1958) 157 C.A. 2d 507; 321 P. 2d. 143; *Kissinger v. City of Los Angeles*, supra.

The *Transoceanic* and *Atkinson* cases should not be distinguished as they were by the trial court on the ground that in those cases, the government entity involved was attempting to revoke a permit. Certainly, the City should not be able to place itself in a better position in this case because the City officials

"sat on their hands" and did not issue use and building permits to which Property Owner was clearly entitled. The City officials thereby forced Property Owner into a position where it had to seek an extension of the development schedule with the City officials knowing in all likelihood because of the then current anti-high rise feeling that such an extension would not be approved by the City Council. As the trial court would have it, since Property Owner did not obtain new permits from the City in 1976, Property Owner cannot have vested rights, ignoring all considerations of equity and fairness.

The trial court to support its position that Property Owner has no vested right to complete the construction of its ten-story building relied upon *Avco Community Developers, Inc. v. South Coast Region Commission* 17 Cal. 3d 785, 122 Cal. Rptr. 810 (1976) and *Oceanic California, Inc. v. North Central Coast Reg. Com.* 63 C.A. 3d 57, 133 Cal. Rptr. 644 (1976). The trial court's reliance on these cases is misplaced. Both cases involve interpretation of the California Coastal Conservation Act of 1972 by writs of mandamus to compel the granting of exemptins from the permit requirements for property within the California Coastal Zone. Property Owner's project is not within the California Coastal Zone and therefore the Act does not apply to it.

The trial court also failed to note that in both *Avco* and *Oceanic*, all that was sought was an examption from a permit requirement, which was only an interim measure and which would be automatically repealed 91 days after adjournment of the 1976 regular session of the legislature. Both Avco and Oceanic had the right to seek the desired permits after losing on the exemption request.

Such is not the case with Property Owner's project. Property Owner is at the end of the road. The City has refused to issue any permits for completion of the six-story addition and has

refused to grant an extension of the development schedule. The $450,000 investment in the construction of the first four floors to accommodate the additional six floors has no economic value in the four-story building and would be a complete loss if Property Owner is unable to proceed. Similarly the $500,000 investment in the plans, steel and elevators for the six-story addition has substantially no economic value except for scrap unless used in the six-story addition. Thus if the trial court's and Court of Appeal's decisions stand, Property Owner will lose substantially all of these investments not counting the time and effort expanded towards the six-story addition with no hope of any change in the political climate or the 50-foot height limit in the City of Palo Alto. It is just this kind of inequity and unfairness that the law of vested rights is designed to prevent.

The Court of Appeal in its opinion (App. B) stated that Property Owner can have no vested rights under the 1970 use and building permits since they expired before Property Owner completed the six-story addition but cited no authority. Property Owner was not able to complete the six-story addition because of inability to obtain financing. Under similar facts another California Court of Appeal recently held that lapsing of a building permit does not destroy Property Owner's vested rights. *Pardee Construction Company v. California Coastal Commission* 95 Cal. App. 3d 471, 157 Cal. Rptr. 184 (1979).

If the decision in this case is allowed to stand, the result will be that there are no vested rights in real property in California except where there is a revocation of an existing permit. All actions by local governments with respect to zoning will be immune from the constitutional requirement that has governed the taking of private property for public purposes and which is fundamental to the preservation of private property rights.

The issues presented by this case are national in scope particularly since the advent of frequent down zoning to reduce

height limits and to provide more open space having an impact on many other owners of private property. This Court has never intimated, let alone held, that the constitutional requirement of just compensation has any diminished application when private property is taken to preserve air space or open space. It is clear that this case properly raises substantial constitutional questions which are pervasive in scope and critical in their effect which urgently require this Court's resolution. The purported substitution of invalidation by mandamus or declaratory relief of the offending regulations is not a satisfactory substitute for just compensation for property rights which have been taken away. As ably pointed by Judge Clark in his dissent in *Agins v. City of Tiburon*, supra

> . . . the majority solution is really a nonremedy for an aggrieved landowner. If he can protect his lands only through a proceeding to declare the invalidity of a land use regulation, he must lose interim use of his land—most likely for a period of years—suffering substantial legal costs, even though he may ultimately prevail. Moreover, there is nothing to prevent the governmental agency from reenacting a modified ordinance compelling a second or even third proceeding—a burden exceeding bare possibility in view of the majority's invitation to oppressive land use limitation. Many landowners—particularly small ones—will be economically unable to challenge even a confiscatory enactment, being compelled to walk away from their properties.

Property Owner should be entitled to its "distinct investment backed expectations" in its ten-story office building approved in Ordinance No. 2224. *Penn Central Transportation Co. v. City of New York* 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon* 260 U. S. 393 (1922); *Dobbins v. City of Los Angeles*, supra.

3. Jurisdiction Should be Granted Because of the Denial of the Equal Protection Issue Involved.

Under the Fourteenth Amendment, Property Owner is

entitled to equal protection under the law. *Yick Wo v. Hopkins* 118 U.S. 356, 13. L. Ed. 220, 65 S. Ct. 1064 (1885). Property Owner was discriminated against when the City denied its request for an extension of the development schedule. In all cases prior thereto in planned community developments all requests for extensions of the development schedule had been granted with some having factual situations very little different from Property Owner's facutal situation. The City cannot arbitrarily substitute "changed circumstances" for "good cause" and deny Property Owner's request for an extension of the development schedule. See §18.68.080 D (App. E)

The trial court in its opinion (App. A) states that a "request to change the expiration date (i.e., extend it an additional year) contemplates an ordinance amendment." This is erroneous. From §18.68.080 (D) (App. E) no amendment of the P-C ordinance is contemplated by the granting of an extension. If this were true, a public hearing would be required under the provisions of Chapter 18.98 for amendments, alterations, and changes in districts under the City Zoning Code.

That an extension of the development schedule in a P-C district is not a change of the plan is shared by the Assistant City Attorney Green who stated in the October 27, 1976 meeting of the Planning Commission on the one-year extension:

> "It appears that more properly under the provisions of the California Environmental Quality Act the extension is *not a change of plan.* (Emphasis supplied.)

In ascertaining whether "good cause" was shown by the property owner, the Planning Commission and the City Council were in fact performing an adjudicative function. They were not considering rezoning the property as the trial court was apparently led to believe. Certainly, the City should not have the option of reviewing the project de novo as if the P-C District had not been in existence particularly when the one requesting the extension had spent money, time and effort in good faith in

construction in the P-C District for a specific building in a specific location in reliance on a building permit.

Under Chapter 18.98 of City's zoning code, any amendments, alterations, and changes in zoning districts such as Property Owner's P-C district, the giving of notice of a public hearing is required (§18.98.060) and the taking of evidence and making findings (§18.98.070 and 18.98.080). As stated in §18.98.070, the "recommendation of the commission to the council shall be in writing and shall set forth *fully the findings* and determinations of the commission on the matter involved." Thus under City's code, if an extension of the development schedule constitutes a P-C change, which Property Owner submits it does not, a publically noticed hearing and findings would have been required.

In connection with Subsection D of §18.68.080 of the Palo Alto zoning code on P-C Districts, it must be noted that for "good cause" an extension of the development schedule may be made without a public hearing. There is nothing in this code section which permits denial of an extension of the development schedule *without a public hearing* which, as in the present case, would cause a change in zoning or a reversion in zoning resulting in a P-C District which only permits a four-story building. The City's Zoning Code as pointed out above prohibits such action without a public hearing and findings. The denial of the request for an extension constitutes a "taking" of Property Owner's property rights.

CONCLUSION

The recent opinion of the Supreme Court in *San Diego Gas* leaves unresolved whether the California courts can deny a monetary remedy. This is an important constitutional issue having nationwide significance. The present case presents a factual situation which gives the Supreme Court jurisdiction

to decide the monetary issue where the Property Owner has been foreclosed from any use of the rights to six additional stories of a ten-story office building by challenged zoning regulations and also has been foreclosed from monetary compensation. See article entitled "Take My Property, Please: The Inverse Condemnation Remedy" by Widman (App. G).

The California courts' rulings that Property Owner has no vested rights to the six-story addition for its vertically-phased ten-story building constitutes a "taking" of private property in the constitutional sense and violates fundamental well established Constitutionally guaranteed vested property rights. Upholding the rulings of the California courts in this case would indicate that vested property rights in California are virtually eliminated. Similarly, the California courts' rulings that the City can use tactics to force Property Owner to seek an extention of the development schedule and then deny an extension of the development schedule without a public hearing by substituting "changed circumstances" for "good cause" and failing to make findings as required by the zoning regulations also constitutes a "taking" of private property in the constitutional sense. If City prevails in this "taking" there is an inverse condemnation because all of petitioner's property rights in the six-story addition have been "taken" including the approximately $1,000,000 invested in good faith to complete the six-story addition. Just compensation must be paid for such a taking and the holding in the California Supreme Court case of *Agins v. City of Tiburon*, supra, to the effect that there can be no recovery of money damages for such a "taking" must be reversed.

For the foregoing reasons, jurisdiction should be noted.

Respectfully submitted,

FLEHR, HOHBACH, TEST,
ALBRITTON & HERBERT

By /s/ Harold C. Hohbach
Harold C. Hohbach
Counsel for Appellant

August 1981

Appendix

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Office-Supreme Court, U.S.
FILED
AUG 7 1981
ALEXANDER L. STEVAS,
CLERK

81-404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. _____

COURT HOUSE PLAZA COMPANY,
Appellant,

v.

CITY OF PALO ALTO ET AL.,
Appellees.

On Appeal From The Supreme Court Of California

APPENDIX TO JURISDICTIONAL STATEMENT

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August 1981

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APPENDIX A

(1) Memo of Decision of the Superior Court of the State of California in and for the County of Santa Clara filed on May 11, 1978

(2) Findings of Fact and Conclusions of Law of the Superior Court of the State of California in and for the County of Santa Clara, filed on July 10, 1978

(3) Judgment of the Superior Court of the State of California in and for the County of Santa Clara, filed on July 10, 1978

MAY 11 1978

COURT HOUSE PLAZA COMPANY, a limited partnership,

Petitioner,

vs.

No. P 32449

THE CITY OF PALO ALTO, a municipal corporation, STANLEY R. NORTON, BYRON D. SHER, FRED S. EVERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEAHRS, Councilmen, PETER F. CARPENTER, MARY GORDON, WILLIAM E. GREEN, RAY W. MITCHELL, FRANK J. RACK, EMILY M. RENZEL, ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPHTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney, and LOUIS B. GREEN, Assistant City Attorney,

MEMO OF DECISION

Respondents.

Petitioner seeks a writ of mandate directing respondent City of Palo Alto (hereinafter called "City") to issue both a use and

building permit for the construction of six additional floors to an existing four-story building together with either off-street surface parking or parking structures. For the reasons hereinafter stated, the petition for the writ is denied.

The chronology of this case spans some 12 years beginning with the adoption by City of Ordinance No. 2224 on December 28, 1964 establishing a planned community zoning district with a completion date for the development of October 31, 1976. The ordinance contained a development schedule that provided for two phases of construction. Phase one called for the start of construction of a four-story office building and a two-level parking garage. Phase two provided for the construction of six additional floors and the completion of the parking garage by the addition of five more levels, all of which was to be started by October 31, 1976. Only the four-story building has been completed.

In August 1965, City was informed that the County of Santa Clara intended to condemn a part of the property petitioner had planned to use for the parking structure. Accordingly, City adopted Resolution No. 3860 (Exhibit No. 8) on December 13, 1965 approving construction of the first phase with 107 temporary off-street parking spaces in lieu of the permanent parking structure. Thereafter on June 14, 1966, a building permit was issued, and construction of the four-story building was completed in August 1967. On December 11, 1967, City adopted Resolution No. 4055 which gave petitioner until December 13, 1968 to start construction of the parking structure.

On February 15, 1968, petitioner instructed its architect to complete the drawings for the construction of phase two. The drawings were completed in the Fall of 1968. Before the drawings were completed, City adopted Resolution No. 4113 on May 6, 1968. This resoultion rescinded Resolution Nos. 3860 and 4055. It also continued the authorization of 107

surface parking spaces and provided that "construction of the permanent parking structure shall start on or before October 31, 1976." The remaining fifth through tenth floors were to "remain unused and unoccupied until the parking structure is completed."

In the Fall of 1963, petitioner ordered the structural steel and elevators for phase two and submitted the plans for bid. On September 30, 1969, the then managing partner of petitioner (W. G. Dunn) instructed the general contractor to "immediately commence placement of all subcontracts for the construction of the six-story building addition" (Exhibit No. R 40). Approximately two months later (December 1, 1969), petitioner applied for a building permit for phase two. A controversy between petitioner and City arose over the installation of a smoke-proof tower, and the matter was resolved on February 2, 1970. (Exhibit No. 17). On Feburary 16, 1970, a building permit was issued; and on March 30, 1970, a use permit was issued following an appeal from the city zoning administrator's refusal to issue the permit due to a change in the height dimensions of the building.

No construction work was undertaken on either the six-story addition or the parking structure, and following the granting of extensions of the use and building permits, both permits expired. Approximately a year later (February 27, 1973), petitioner applied for a new use permit for phase two but on March 20, 1973 withdrew the application. On September 24, 1973, City enacted Ordinance No. 2745 which placed a 50-foot height limit on all buildings.

Petitioner did nothing about further construction until August 11,1976, a little over three years later. At that time, petitioner requested a three-year extension of the development plan which was denied by the planning commission of City on August 25, 1976. No appeal was taken from this denial. Instead,

petitioner filed an application for a use permit for phase two on August 30, 1976. One day later, petitioner submitted an application for a building permit on the basis of the 1968 building plans. The building inspector for City refused to issue a permit claiming the plans did not conform to the then existing building code.

On October 1, 1976, petitioner sought to amend the development plan by extending it one year from October 31, 1976. The planning commission denied the request for change on October 27, 1976, and this was appealed to the city council. On October 28, 1976, the city building inspector denied petitioner's request for an interim building permit on the grounds that no use permit had been gratned and no plans for construction of a parking structure had been submitted. Finally, on December 6, 1976, the city council denied the petitioner's request for the one-year extension. This lawsuit followed.

Petitioner contends that because of the completion of phase one and the expenditure of approximately one million dollars for construction plans, structural steel and elevators for phase two, a vested right was acquired by petitioner that now makes it mandatory that City issue a building permit for the six additional floors. Additionally, petitioner contends that City is estopped from refusing to issue the building permit.

The vested rights issue is based upon petitioner's interpretatin of case law. The estoppel theory is predicated on the conduct of city officials and the acts of City which, petitioner claims, prevented the start of construction before October 31, 1976.

More specifically with respect to petitioner's contentions, it is claimed that the relocation of the Birch Street off-ramp by the County of Santa Clara took part of the land proposed for construction of the multi-story parking facility. The actual alignment was not ascertained for some time, and ultimately on

May 6, 1986, the City adopted Resolution No. 4113 (Exhibit No. 14) permittting 107 off-street parking spaces in lieu of the structure. Petitioner argues that having been deprived of land intended for its parking structure through condemnation proceedings undertaken with City's consent, City cannot now use the "parking issue" to deny a building permit.

Petitioner further complains that it was delayed in the construction of both phase one and phase two and these delays projected petitioner into a period of time of severe economic conditions, such as excessive office space, a nationwide recession, and excessive interest rates on mortgage money. The consequence of these conditions caused by the claimed delay of City meant that petitioner was unable to build the additional six stories when it wanted to.

With particular reference to phase two, petitioner claims that delays were occasioned by City's demand for compliance with the then building code requirements. Principal among the claimed delays was the smoke-tower controversy. This controversy came about after petitioner filed its application for a building permit on December 1, 1969, and it was resolved in petitioner's favor on February 3, 1970 (Exhibit No. 17).

Another phase two delay complained of by petitioner involved the issuance of a use permit. The zoning administrator denied the permit on the grounds that after adding the additional six floors, the building would be fourteen feet higher than shown on the original plan. The denial was appealed and was ultimately resolved in petitioner's favor on March 30, 1970 (Exhibit No. 21).

Finally petitioner claims the City's insistence on having the construction plans submitted on October 15, 1976 reviewed by the International Conference of Building Officials (ICBO) instead of the City caused further delay.

The upshot of all of petitioner's complaints against City is that petitioner claims it is now entitled to complete the construction of the building and, at petitioner's option, provide either surface parking or one or more parking structures.

Respondent City's contentions are, predictably, threefold. First, City claims that the denial of petitioner's request for a one-year extension of the development plan was a legislative act of the city council. As such, the "sole issue" is whether a reasonable basis existed for the council's action. Secondly, City contends there is no basis for estoppel arguing that the delay in the construction of phase two was caused by factors beyond City's ability to control. Finally, City denies that petitioner acquired any vested right to the construction of phase two.

The pivotal issue in this case is the vested rights issue. However, before reaching this issue, it is first necessary to decide which of the two forms of mandamus actions asserted by petitioner is applicable. Petitioner's cause of action seeks relief under both section 1085 and 1094.5 of the Code of Civil Procedure (all references to section numbers will be to this Code). For the reasons hereinafter stated, only section 1085 is applicable.

First of all, petitioner's request to the city council for an extension of one year dealt with a city zoning matter. More specifically, it dealt with an amendment to a city zoning ordinance. The ordinance in question (No. 2224) established a P-C zoning district on petitioner's property that contained an expiration date of October 31, 1976. A request to change the expiration date (i.e., extend it an additional year) contemplates an ordinance amendment. The act of considering an amendment to an ordinance relating to zoning of property is a legislative function. Under the law of this state, such action is reviewable only by the ordinary, or so-called "traditional", mandamus governed by section 1085. *Ensign Bickford Realty v. City Council, Liver-*

more (1977) 68 C.A. 3d 467, 473. The mandamus statute contained in section 1094.5 applies only to administrative adjudications, quasi-judicial in nature, and does not apply to municipal legislative actions. In deciding whether or not to extend the zoning ordinance, the city council's function was to receive and consider such matters as economic, social, political, engineering, and planning data as well as opinion and argument from interested parties. This obligation to conduct public hearings, accept evidence, and make findings creates characteristics shared by adjudicatory proceedings but does not render the function adjudicative in nature. The city council in considering and deciding upon the request in this case to extend the ordinance was not acting in a quasi-judicial capacity but was performing a legislative function subject only to traditional mandamus review. *(Concerned Citizens Committee v. Bd. of Supervisors* (1978) 78 C.A. 3d 603, 609–610). Thus, this Court holds that section 1085 is controlling in this case and not section 1094.5.

The scope of review by the trial court in traditional mandamus actions (section 1085) requires only an examination into whether the action taken was arbitrary, capricious, or entirely lacking in evidentiary support. *(Concerned Citizens Committee v. B. of Supervisors,* supra, page 609). Additionally, in connection with the review, it must be kept in mind that a city council in amending a zoning ordinance is not required to make express findings of fact as to the public purpose of the ordinance or its relation to the police power. Moreover, council members are not required to articulate for the record all of the reasons and motives behind their decisions. *(Ensign Bickford Realty v. City Council,* supra, p. 473, 479).

While it is true that the scope of judicial review of legislative matters is whether the action taken was arbitrary, capricious or entirely lacking in evidentiary support, the test appears to be different when review is sought under section 1094.5 and a

vested rights issue is involved. The authorities appear to hold that if a vested right has been acquired, any action by a public agency affecting that right is subject to review by the court applying its independent judgment of the validity of the action taken. On the other hand, if no fundamental vested right has been substantially affected, the public agency's action is then judged by the substantial evidence standard. Under the latter test, if the court finds that the factual finding of the public agency is supported by substantial evidence in light of the whole record, the local agency's action must be affirmed. *Strumksy v. San Diego County Employees' Assoc.* (1974) 11 Cal. 3d 28.

Assuming *arguendo* that section 1094.5 is applicable, it will be seen that no fundamental vested right was ever acquired by petitioner. Absent such a right, the test is whether there was substantial evidence to support the city council's action. The evidence reveals that even under this more restrictive test (than that imposed under section 1085 in reviewing legislative actions), the council's action was supported by substantial evidence.

As stated earlier, petitioner asserts it has a vested right to construct phase two because of its expenditure of a large sum of money in preparation for the construction and stresses in support of that right that there was a specific building agreed upon, namely, a ten-story building, that was partially constructed. Petitioner also argues that construction *had* started before October 31, 1976 so actually no extension was required. In support of its position that vested rights have accrued, petitioner has placed considerable reliance on *Trans-Oceanic Oil Corp. v. City of Santa Barbara* (1948) 85 C.A. 2d 776, *Atkinson v. Piper* (1923) 195 N.W. 544, Sp. Ct. Wisconsin, and several decisions from other states. Petitioner's reliance on these authorities is misplaced. On the facts they are distinguishable from the case at hand.

Doubtless the most salient fact in this case is that at the time the City denied the petitioner's request for extension of the development plan on December 7, 1976, no building permit had been issued for the construction of the six-story addition or the parking structure. (The previously issued building permit expired July 1, 1971 and the use permit on March 30, 1972). In both *Trans-Oceanic* and *Atkinson v. Piper*, the court found that vested rights had accrued, and the construction was allowed to continue. However, in both cases, *the permit had been issued* and substantial work had been performed under the *existing* (i.e., issued) permit.

Trans-Oceanic involved an oil drilling permit issued by the City of Santa Barbara. No time limit was stated as to when the work was to begin. Before actual drilling began, World War II started, and the oil company was unable to proceed until some six years later. In the meantime, the city had adopted an ordinance making the drilling for oil on the company's property unlawful. About a year after the ordinance had been adopted, the company resumed activities preparatory to drilling. Considerable equipment and material were on the site with crews working when the company was informed that the city had revoked the drilling permit. The revocation was accomplished without notice or hearing to the oil company. In holding that the revocation of the permit was improper, the appellate court found (among other things) that the oil company had not abandoned its rights under the permit and that it had proceeded within a reasonable time. (page 790) The point of this conclusion, as it relates to the case at hand, is that the permit *was still in effect* and the oil company was *still operating under the permit* at the time the city attempted to revoke it.

The same is true in *Atkinson v. Piper*. There, a telephone company built an eight-story building, and *before* the passage of a state law regulating building heights, the company decided to add five additional floors. Considerable sums were spent or-

dering equipment and material. A building permit was acquired from the City of Milwaukee, and actual construction began *before the passage of the law.* In holding that the company could proceed under the permit and was not subject to the height restrictions, the court said:

> "To construe this law as applying to the telephone company's building would work great hardship, a serious invasion of vested rights and would give to the statute a retrospective effect, which should not be given in the absence of plain legislative purpose." (p. 549)

Again, it is of particular significance to note that the telephone company had a valid and *existing* building permit at the time the attempt was made to revoke it.

Thus, in both the *Trans-Oceanic* and *Atkinson* cases, money, labor and materials had been expended under a building permit that was then *issued* at the time action was taken to revoke the permit. Clearly under the law, vested rights had been acquired. That situation does not exist, however, with the case at hand.

It will be recalled that both a building and a use permit were issued for phase two. The former on February 16, 1970, the latter on March 31, 1970. Both permits were extended upon petitioner's request, and both eventually expired; the last to do so was the use permit on March 30, 1972. Thus, when petitioner applied for his extension of the development plan, no permits of any kind were then issued or existing. Under these circumstances, no vested right to complete the construction of the building had been acquired by petitioner. This is so notwithstanding that considerable money had been spent in anticipation of the construction of the six additional floors. Authority for this conclusion is found in *Avco Community Developers Inc. v. South Coast Regional Commission* (1976), 17 Cal. 3d 785, and *Oceanic California, Inc. v. No. Central Coast Regional Commission* (1976) 63 C.A. 3d 57.

In *Avco,* the Supreme Court was called upon to decide

whether the developer of a subdivision acquired a vested right to construct buildings on its land without a permit from the California Coastal Zone Commission. The developer (Avco) had subdivided and graded the land and had made improvements such as installing utilities. However, the developer had not applied for or received a building permit for any structures before the effective date of the Coastal Zone Conservation Act. Before that date, the developer had spent over $2 million and incurrred another three quarters of a million dollars in liabilities. The trial court held that because the developer did not have a building permit, it did not have a vested right to construct the buildings. The Supreme Court affirmed, saying in pertinent part:

> "Our conclusion that Avco has not acquired a vested right under the common law to proceed with its-development absent a permit from the commission is not founded upon an obdurate adherence to archaic concepts inappropriate in the context of modern development practices or upon a blind insistence on an instrument entitled "building permit.'
>
> "If we were to accept the premise that the construction of subdivision improvements or the zoning of the land for a planned community are sufficient to afford a developer a vested right to construct buildings on the land in accordance with the laws in effect at the time the improvements are made or the zoning enacted, there could be serious impairment of the government's right to control land use policy. In some cases the inevitable consequence would be to freeze the zoning laws applicable to a subdivision or a planned unit development as of the time these events occurred." (p. 797)

In the *Oceanic* case, the developer acquired approximately 5,200 acres of land and over an eight-year period prior to the enactment of the Coastal Zone Conservation Act obtained numerous zoning approvals, subdivision map approvals, use permits, grading permits and building permits. Substantial work was performed, and $30 million was expanded by the developer. Approximatel 350 single family residences and 14

condominiums were constructed. Also constructed was a lodge, store facility and recreation facilities. Use permits were obtained to construct three waste water treatment plants, and two were actually constructed. The work and money expended were under a planned community zoning that had been approved by the county. Based upon the foregoing, the developer sought an exemption from the permit provisions of the Coastal Act on the ground that it had acquired a vested right to complete the development. The trial court found that no vested rights had been acquired and denied the exemption. The appellate court affirmed. Of particular importance is the holding of the court in *Oceanic* that approval of existing plans for a development based upon standards already established and agreed upon does *not* render approval of precise plans, use permits and building permits a mere ministerial act.

There are striking similarities between *Avco* and *Oceanic* that have significant meaning in this case. Considerable work was done, and large sums of money were spent by the developers in *Avco* and *Oceanic*. (Approximately $3 and $30 million, respectively). In both cases, the work was done and the money spent, not on any hypothesis that the projects might someday be completed, but on the full and complete plan and expectation that they in fact would be completed. However, before the work could continue under the existing development plans, building permits were required. Neither developer in *Avco* or *Oceanic* had the requisite permits.

Comparing the similarities of *Avco* and *Oceanic* to the case at hand reveals that petitioner also spent a large sum of money, also completed a part of the total project, and did not have a building permit for the rest of the project. A further comparison shows an important difference in the position represented by petitioner on the one hand and *Avco* and *Oceanic* on the other. This difference, which does not inure to petitioner's

advantage, is that petitioner had a completed building even without the additional six floors. Petitioner's building is a self-contained, functional structure. This was not the case nor the position in which the developer found itself in either *Avco* or *Oceanic*. The completion of the entire project was essential to the overall function of the planned development in the latter two cases. Thus, if the higher courts could not find that the developer in *Avco* and *Oceanic* acquired vested rights to complete their existing development plan, it is difficult to see how petitioner stands in any better position.

Petitioner's argument that considerable expenditures were made in reliance on the right to construct phase two requires special mention. At the outset, petitioner's architect raised the question about the additional expense incurred in designing the structure for ten stories when the possibility existed that only the first four stories would ever be constructed. The risk of incurring this expense which might never be recovered was one that petitioner was apparently willing to assume.

Next, it will be recalled that by the Fall of 1968, petitioner had obligated itself for complete architectural drawings, the structural steel and elevators for the six additional floors. These obligations were incurred some 18 months *before* hte first building permit for phase two was issued (on February 16, 1970). It stands to reason that it cannot seriously be contended that the expenditures for the drawings, the steel, the elevators and the original structural expenses to accommodate ten stories were all incurred in reliance on the issuance of the building permit in 1970, or at any subsequent date. On this particular point, the Supreme Court in *Avco* said that a developer does not acquire a vested right "without first having acquired a *building permit* to construct a specific type of building and having *thereafter* expended a considerable sum of money in reliance upon said permit." (Page 793; emphasis in original).

The sequence of events in the instant case together with the holding of the Supreme Court in *Avco* further show the fallacy of petitioner's argument that expenditures were made in reliance upon a right to construct phase two.

Turning now to the city council's denial of the one-year extension, the minutes of the council meeting of December 6, 1977 reveal that the request for extension was submitted to lengthy debate in which all relevant issues were discussed and in which petitioner and counsel, members of the public, members of the City's staff and council members fully participated. The discussion began with the chairperson of the planning commission who described the commission's reasons for denying the extension. These were: the unresolved parking problem, the 10 year length of time for completing the development, the advantage over others in granting an extension, the changed conditins of the area and height limitations that could be considered.

Considerable discussion followed among council members covering such subjects as the impact of the condemnation action on the parking requirements, the economics of the project, building height limits, environmental impact reports, delays in completing the project, the interests of the community, the general changes in the City's comprehensive plan. The pros and cons from public participants mentioned the added jobs and taxes to be derived from the building's construction on the one hand to the need for an environment report and general opposition to the building and its proposed height on the other.

Petitioner and petitioner's counsel described the project's history, the many problems encountered, the City's past practice of granting extensions, and the attempts to complete the development. Petitioner pleaded with the council for fair and equal treatment.

It cannot be gainsaid that the council thoroughly considered this request at its meeting. Even a cursory look at the minutes

shows that the discussions and deliberations were complete and unhurried. The factual data the council had before it fairly represented both sides of the issue. The action taken by the council in denying the request was supported by more than substantial evidence. By no means, in reason or logic, could it be properly or accurately said that the council's action was taken arbitrarily, capriciously or entirely lacking in support. In this regard, assuming *arguendo,* as petitioner contends, that the test of the council's action requires the Court to exercise its independent judgment, the Court has no hesitancy in stating that if this were the test, there is ample evidence from which the Court using its independent judgment would have reached the same conclusion as the city council.

As mentioned earlier, petitioner contends that City caused delays that resulted in economic problems and prevented the start of construction of phase two. The delays complained of are actually four in number: (1) the condemnation for the Birch Street off-ramp and Page Mill Road realignment, (2) the condemnation of the Grant Avenue-Birch Street parking parcel, (3) the smokeproof tower issue, and (4) the use permit issuance.

The first two items are condemnation actions undertaken by the County of Santa Clara. In both, petitioner received compensation. In the Birch Street off-ramp action, City was signatory to the City and County's Expressway Agreement in 1962, but until the County actually determined the off-ramp alignment sometime in 1969, City was in no better position to know the effect of the street improvement on the parking problem than was petitioner. In an attempt to alleviate the problem caused by this uncertainty so as to allow petitioner to proceed, at least on a temporary basis, City adopted Resolution No. 3860 on December 13, 1965, allowing off-street parking in lieu of the required parking structure. Thus, phase one was completed in August 1967, and the building was substantially leased by the Spring of 1968. Six months after completion, petitioner

ordered its architect to complete plans for phase two. Three months later, City adopted Resolution No. 4113 to further assist in the solution of the parking problem and to allow petitioner to obtain permanent financing.

Viewing this timetable, considering City's lack of responsibility for the County's condemnation action (and the property eventually acquired), and the efforts of City to find a solution to the parking problem, it cannot reasonably be concluded that the fault for any delay lies at City's doorstep.

The dispute over the somkeproof tower lasted approximately two months. A letter from petitioner dated December 1, 1969 requesting the resolution of the dispute resulted in an opinion from the city attorney's office under date of February 3, 1970 settling the issue in petitioner's favor. Incidentally on this matter, petitioner argued strenuously that the letter from the city attorney's office (Exhibit No. 18) shows that City recognized that petitioner had a vested right to construct phase two. There are two arguments that demonstrate the error of petitioner's claim. First, the letter from the city attorney is only his opinion. It is not the law, and in the case where the opinion and the law are at odd, obviously the law prevails. As shown earlier, the law is that no vested rights accrued to petitioner. Second, the letter is ambiguous, but the ambiguity was removed by the very author of the letter who testified that the only vested right he had in mind was to "a method of construction", namely, an interior smokeshaft in the *existing* four-story building. The reference to "vested rights" in Exhibit 18 (according to the author) was "not at all" intended to apply to the additional six stories.

The use permit controversy extended over a six-week period. This involved petitioner's application for a use permit which was denied by the zoning administrator because the plans showed a building that was 14 feet higher than originally de-

signed. The denial was appealed to the city council, and the use permit was issued.

The issues involved in both the smokeproof tower and use permit were of considerable importance in the minds of the staff of City who had responsibility for them. The action taken by staff was done in good faith; they involved conferences and city council action in one instance. Under all the circumstances, it cannot be reasonably said that the time spent on resolving these issues was inordinate.

Lastly, petitioner claims City's staff caused delays in approving phase two building plans in 1976. Petitioner takes particular issue at the staff's decision to submit the plans to ICBO for approval. City's explanation for this is reasonable. There were numerous building code changes that required extensive review of the plans submitted by petitioner, and because of the complexities of the changes and the then existing time constraints, City's building inspector testified that his office could not do the review and approval. It was for this reason the building inspector suggested sending the plans to ICBO. There was never any intent on the building inspector's part to obstruct or delay petitioner. Underlying City's actionon petitioner's request for approval of the building plans was the necessity to assure that the plans conformed to the requirements of the building code. It is the rule that a builder must comply with the laws in effect at the time a building permit is issued, including the laws which were enacted after application for the permit. *(Brougher v. Bd. of Public Works* (1928) 205 Cal. 426, 435). The Court concludes that City was attempting to fulfill the obligations imposed by law.

At this juncture, it is significant to recall that at the city council meeting of December 6, 1976, petitioner was asked on two separate occasions if it had been dealt with in good faith by City. Both times the answer was affirmative. If this was not

the case, then either petitioner withheld information that the council might have been interested in considering, or petitioner must have considered that any lack of good faith was at best minimal or so inconsequential as to be ignored. Further in this regard, judging from the demeanor and credibility of City's witnesses, the Court finds no evidence of any deliberate or willful attempt to delay, hinder or obstruct petitioner in the completion of either phase one or phase two. Quite to the contrary, City's employees appeared to be doing no more than what would be required of conscientious officials obligated to comply with the laws, ordinances and regulations.

For all of the foregoing reasons, petitioner's application for a writ of mandamus is denied.

DATED: May 10, 1978.

JOHN R. KENNEDY
Judge of the Superior Court

(ENDORSED)
FILED
Oct. 10 1978
JOHN KAZUBOWSKI
COUNTY CLERK

COURT HOUSE PLAZA COMPANY,
a limited partnership,
Petitioner,

vs.

No. P 32449

THE CITY OF PALO ALTO, a municipal corporation, et al.,
Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A petition for writ of mandamus has been filed herein by Petitioner. Respondents filed a timely return and the matter came on regularly before this Court for trial on Feburary 21, 1978, and succeeding dates. The record of the administrative proceedings was received into evidence, examined and considered by the Court and additional evidence, both oral and documentary, was admitted, examined and considered by the Court. Trial briefs and post-trial briefs have been filed by both parties and examined and considered by the Court. Both parties have orally argued the matter to the Court on March 30, 1978.

Following its examination and consideration of all of the foregoing matters, the Court rendered and filed its Memo of Decision on May 11, 1978.

Petitioner thereafter filed its request for findings of fact and conclusions of law, and the Court filed its order directing Respondents to prepare proposed findings of fact and conclu-

sions of law and a proposed judgment.

The Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Petitioner, Courthouse Plaza Company, a limited partnership, was and is the owner of the four-story office building located at 260 Sheridan Avenue, Palo Alto, California. The four-story building is in a block bounded by Sheridan Avenue on the east, Birch Street on the south, Grant Avenue on the west and Park Boulevard on the north.

2. Respondent, City of Palo Alto ("City") is a municipal corporation and a charter city.

3. The City Council of City ("Council") passed Ordinance No. 2224 on December 28, 1964, rezoning the subject property to a "Planned Community" ("PC") zoning district.

4. Ordinance No. 2224 became effective on January 28, 1965.

5. Ordinance No. 2224 contains a Development Plan and Development Schedule providing for two phases of construction. Phase 1 provided for start of construction of a four-story office building and a parking garage within two years of Council approval. Phase 2 provided for a start of construction of six additional floors of the four-story office building and additional levels on the parking garage by October 31, 1976.

6. In August, 1965, City was informed that a part of the subject property planned by Petitioner for the permanent parking structure approved by Ordinance No. 2224 might be required by the County of Santa Clara ("County") for a County road project (Page Mill-Birch Street realignment). From 1961 on, the County wanted to undertake this project to improve traffic safety on the County Expressway System, of which the

Birch Street off-ramp (adjacent to the parking structure site) was a part. The County initiated, designed and constructed improvements for that project, including the Birch Street off-ramp, and condemned the land for the same. The County retained control of the project and there is no evidence that the City had any control over the project.County did not actually determine its condemnation take from the parking structure site until 1969. Accordingly, in an attempt to alleviate the problem caused by this uncertainty so as to allow Petitioner to proceed on a temporary basis, the Council passed Resolution No. 3860 on December 13, 1965, amending the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224. Resolution No. 3860 approved construction of Phase 1 with 107 temporary offstreet parking spaces in lieu of the required permanent parking structure and gave Petitioner an extension of time until December 13, 1968, to start construction of the parking structure.

7. City Zoning Ordinance §18.68.070(a) allows PC zoning districts to be amended by resolution rather than ordinance.

8. In October, 1965, the County asked the City to make no allowance for improvement of approximately 11,500 square feet of the subject property at the intersection of Grant Avenue and Birch Street (the "Grant-Birch" parcel). The County made this request, since it intended to condemn that part of the subject property for expansion of the North Santa Clara County Courthouse and did not wish to pay for improvements thereto. Petitioner withdrew this parcel from its original project proposal prior to passage of Ordinance No. 2224, at the urging of a private merchants' group, thus facilitating the Courthouse expansion. There is no evidence that the City was responsible for the acqusition of the Grant-Birch parcel.

9. In 1966, the County commenced condemnation proceedings for acquisition of the Grant-Birch parcel. In the Spring of

1967, following a jury trial, the County acquired this parcel and Petitioner received just compensation for the taking.

10. On January 17, 1966, City issued a use permit for the Phase 1 four-story building, promptly following passage of Resolution No. 3860.

11. On June 14, 1966, City issued a building permit for construction of a four-story office building as approved by Ordinance No. 2224 and Resoultion No. 3860 (Exhibit 10).

12. Prior to June 14, 1966, Petitioner's architect, Albert A. Hoover, raised the question with Petitioner about the additional expense to be incurred in designing and building the four-story office building to accommodate a six-story addition when the possibility existed that only the first four stories would ever be constructed and, therefore, such additional expenses could not be recovered. Petitioner was willing to assume the risk of incurring such expense.

13. The four-story building authorized by the June 14, 1966, building permit (Exhibit 10) was completed in August, 1977. It was substantially leased by the Spring of 1968. It is a self-contained, functional structure even without the additional six floors, and has been occupied and used up to and including the present.

14. On December 11, 1967, Council plassed Resolution No. 4055, amending the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224 and giving Petitioner an extension of time until December 13, 1969, to start construction of the parking structure.

15. Before February 15, 1968, and within six months after completion of the four-story building, Petitioner instructed its architect to proceed forthwith in preparing a complete set of working drawings for the six-story addition for Phase 2. The drawings were completed by the Fall of 1968.

16. As to the design of both Phase 1 and 2, the practice of Petitioner's architect was to apply changes in local and state laws, such as the Uniform Building Code, occurring after commencement of work on each of such phases.

17. Before the Phase 2 drawings were completed, the Council passed Resolution No. 4113 on May 6, 1968 (Exhibit 14) to further assist in the solution of the parking problem and to allow Petitioner to obtain permanent financing for Phase 2. This resolution amended the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224. It rescinded Resolutions Nos. 3860 and 4055. It also continued the prior authorization of 107 surface parking spaces in lieu of the permanent parking structure and permitted use and occupancy of the four-story building with such surface parking. It provided further that "construction of the permanent parking structure shall start on or before October 31,1976"—the same date provided in Ordinance No. 2224 for start of construction of the six-story addition. Finally, Resolution No. 4113 provided that the six-story addition "shall remain unused and unoccupied until the parking structure is completed." Except as herein indicated, Resolution No. 4113 left all other sections of Ordinance No. 2224 as originally written. Resolution No. 4113 has never been amended.

18. By Fall, 1968, Petitioner had obligated itself to its architect to pay for the complete Phase 2 working drawings.

19. In August, 1969, after finally determining the engineering design requirements, County commenced condemnation proceedings to acquire approximately 4,000 square feet of the permanent parking structure site between Page Mill Road and Sheridan Avenue for the County's Page Mill/Birch Street realignment ("parking site acquisition"). Prior to this date, Petitioner was free to apply to City for a building permit to build the parking structure approved by Ordinance No. 2224 and

Resolution No. 4113, but decided not to do so for reasons of its own.

20. In the Fall of 1969, Petitioner ordered the structural steel and elevators for Phase 2 and submitted the Phase 2 plans for bid. On September 30, 1969, Petitioner's then managing general partner (W. G. Dunn) instructed its general contractor to "immediately commence placement of all subcontracts for the construction of the six-story building addition" (Exhibit R40), including at least structural steel, steel decking, exterior facade and elevators.

21. By its letter of September 30, 1969 (Exhibit R40), and by the acts of its general contractor pursuant thereto in placing contracts for structural steel (Exhibit R66) and elevators (Exhibit R44), Petitioner fully obligated itslef to pay for Phase 2 development costs prior to obtain financing to construct Phase 2 and prior to being issued a building permit for Phase 2 on February 16, 1970 (almost five months later).

22. Petitioner admits that it committed a mistake by not obtaining financing before committing the partnership to the obligation involved in paying for the steel and elevators for Phase 2, and that this mistake got the partnership into financial difficulties. This mistake was in no way attributable to Respondent or any of its officials or employees.

23. Petitioner's inability to obtain Phase 2 financing was not due to any act or acts of Respondents. Despite continuing efforts throughout 1968 and 1969, Petitioner was unable to obtain anything other than a verbal agreement from a lender in late 1969 which ultimately failed to materialize because the lender found itself overcommitted during that same period of time. Similarly, in the Fall of 1976, Petitioner was unsuccessful in its one effort to obtain Phase 2 financing because the lender's agent stated that time was too short to permit any substantive negotiations prior to the Phase 2 deadline of October 31, 1976, for start of construction.

24. On November 7, 1969, Petitioner executed a real estate purchase contract with Power Construction, Inc. ("Power") under which Petitioner acquired the right to purchase several parcels of land in the block south of and adjacent to the subject property. Petitioner considered the Power parcels as a possible alternative to provide the necessary offstreet parking for the six-story addition. Petitioner never requested a zone change to use the Power percels for such parking despite its awareness of the pending County condemnation for the parking site acquisition, and despite its further awareness of City requirements in this regard by virtue of its zone change application for an amendment to the PC Development Schedule ultimately passed by the Council in Resolution No. 4113 (Exhibit 117). Mr. Power testified that the City never interfered with his contractual relations with Petitioner. Because of Petitioner's inability to obtain Phase 2 financing, the Power parcels were permitted to revert to Power late in 1971, and a quit-claim was executed by Petitioner in 1973.

25. Late in 1969, a controversy between Petitioner and City arose over the installation of a smokeproof tower. Earlier in 1965, City had resolved a similar dispute in Petitioner's favor within three weeks of the date it was raised by permitting construction of Phase 1 with an interior smokeproof tower. The 1969 controversy lasted about two months and was resolved in Petitioner's favor on February 2, 1970, by issuance of a building permit for Phase 2 using a mechanically-ventilated interior smoketower (Exhibits 17 & 19). An inter-office communication from the city attorney's office to the city manager (Exhibit 18) does not show that the City recognized that Petitioner has a vested right to *construct* Phase 2 but instead only a vested right to a *method* of construction, namely an interior smokeshaft in the existing four-story building. The refernece to vested rights in Exhibit 18 does not apply to construction of Phase 2.

26. On March 30, 1970, City issued Petitioner a use permit following an appeal from the City zoning administrator's refusal to issue the use permit on the ground that the proposed six-story addition would create a building approximately 14 feet (or 11 percent) higher than the building approved by the PC zoning in Ordinance No. 2224 and that the proposed addition was a variation not within reasonable limits of the zoning administrator's administrative discretion to approve. The use permit was granted within approximately six weeks after Petitioner applied for it.

27. On March 11, 1970, during a hearing on its appeal from the use permit denial, Petitioner told the City Planning Commission ("Commission") that it would not be building a parking structure, that it had options on sufficient land to provide the required Phase 2 parking, and that it realized it would have to provide parking before it could use and occupy the six-story addition (Exhibit 20, p. 83).

28. On March 30, 1970, at the hearing at which the Council approved the Phase 2 use permit, City advised Petitioner that the PC Development Plan required construction of the parking structure before October, 1976 (Exhibit 21, p. 238).

29. On April 3, 1970, the City staff advised Petitioner in writing that it should file plans in the near future for "consideration of a change of the approved Development Plan which now requires an off-street parking structure" (Exhibit 128).

30. On April 13, 1970, the Council amplified the minutes of its March 30, 1970, meeting to reflect that, as to Phase 2, the "parking requirements are expected to be consistent with the previously approved plan" approved by Ordinance 2224 (Exhibit 22).

31. City granted Petitioner's request of May 22, 1970, to extend the Phase 2 building permit to July 1, 1970 (Exhibit R4).

32. The Phase 2 building permit (Exhibit 19) expired on July 1, 1970, because of Petitioner's inability to obtain financing.

33. City granted Petitioner's request to extend the Phase 2 use permit to March 30, 1972.

34. The Phase 2 use permit expired on March 30, 1972, because of Petitioner's inability to obtain financing.

35. No construction work was ever undertaken on either the Phase 2 six-story additon or the permanent parking structure.

36. In August, 1970, the County of Santa Clara completed condemnation proceedings to acquire approximately 4,000 square feet of the permanent parking structure site between Page Mill Road and Sheridan Avenue for the County's Page Mill/Birch Street realignment. The County acquisition was based on a Stipulation for Judgment executed between Petitioner and County (Exhibit R5). County commenced this condemnation proceeding in August, 1969, approximately one month before Petitioner ordered the steel and elevators for Phase 2 (Exhibit R40). Petitioner received just compensation for this taking, including certain excess lands deeded to it by the County contiguous to the parking structure site.

37. On October 6, 1972, at Petitioner's request, City staff members met with Petitioner for the purpose of discussion construction requirements and processing of Phase 2. There was no intent to delay, hinder or thwart Petitioner in any way on the part of the City staff members present at the October 6, 1972, meeting, or on the part of any other City official, at that time or at any other time.

38. Approximately one year after the Phase 2 use permit expired (February 27, 1973), Petitioner applied for a new use permit for the Phase 2 six-story addition, but withdrew the application on March 20, 1973, without it being acted upon by the City. Petitioner intended to resubmit its application a few

months thereafter, but did not do so because it lost its chief tenant which decided to move to a new facility to achieve its own corporate identity. There was no evidence that the tenant vacated because of Petitioner's inability to provide more space for it in the contemplated six-story addition.

39. On September 24, 1973, the City passed Ordinance No. 2475 (Exhibit R8) placing a 50-foot height limit on buildings in certain zoning districts but not Planned Community zones, such as applies to the subject property.

40. The City passed various ordinances adopting current editions of various construction codes which were applicable to Phase 2. Among these were Ordinance No. 2436, passed on May 27, 1968, adopting the 1967 editions of the Uniform Building, Electrical, Mechanical and Plumbing Codes (Exhibit R3), Ordinance No. 2605, passed on June 7, 1971, adopting the 1970 editions of the Uniform Building and Mechanical Codes (Exhibit R6), and Ordinance No. 2809, passed on August 26, 1974, adopting the 1973 editions of the Uniform Building, Mechanical and Housing Codes.

41. For a period of approximately three years, from the date of its withdrawal of its Phase 2 use permit application on March 20, 1973, Petitioner did nothing about further construction on Phase 2 until June 30, 1976, when it applied for a zone change with respect to the parking problem and also for new uses not previously permitted (Exhibit 225). Despite being told by the City's zoning administrator on March 31,1975, that the City might agree to a reduction of parking spaces, Petitioner waited for more than a year to submit its zone change application. Petitioner did not start working in earnest on the parking problem until October or November, 1975.

42. Petitioner's zone change application of June 30, 1976, was defective in that it included a portion of property not owned by Petitioner and also a portion of the City street on

Sheridan Avenue. No City staff member told Petitioner that such an application would be approved either prior to or after its submittal.

43. Pursuant to §18.68.070(a) of the City Zoning Ordinance governing PC District Regulations, zone changes in a PC district are considered the same as changes in the City zoning map and are in accordance with the general rezoning procedures set forth in City Zoning Ordinance Chapter 18.98. Section 18.98.020 limits zone change applications to the Council or Commission or "a property owner." Section 18.98.030 permits zone change applications to include non-owned property only if it includes the written consent of the owner of record of legal title to make such application.

44. Petitioner's June 30, 1976, zone change application did not include the written consent of the owner of record of legal title to either the privately-owned property (Mrs. Pierson) or the City property in Sheridan Avenue.

45. Petitioner's June 30 zone change application did not request a hearing date before the Commission until August 25, 1976.

46. Almost nine years elapsed from the date Petitioner completed the four-story building on August 17, 1967, to August 11, 1976, when it submitted a request for a three-year extension of the Phase 2 deadline of October 31, 1976, contained in the PC Development Schedule in Ordinance No. 2224 and Resolution No. 4113.

47. On August 25, 1976, the Commission adopted a motion recommending to the Council that the three-year request be denied. This procedure followed the provisions of PC District Regulations set forth in Zoning Ordinance §18.68.080D. Following the Commission's recommendation of denial, Petitioner withdrew its three-year request and, instead, filed an application for a use permit for Phase 2 on August 30, 1976.

48. On August 31, 1976, Petitioner submitted an application for a building permit for the six-story addition based upon the building plans for which a permit had been issued in 1970. These plans had not been revised to meet current code requirements. The City, subsequent to the expiration of the 1970 building permit for the six-story addition, had adopted the 1970 and 1973 editions of the Uniform Building Code and other construction codes. The August 31, 1976, application for a building permit for Phase 2 did not comply with those codes.

49. The City building inspector refused to issue a building permit for the six-story addition on three grounds: (1) the plans submitted did not conform to then existing codes; (2) no use permit had been issued for the six-story addition as required by §18.68.040 of the PC District Regulations and (3) Petitioner's zone change application of June 30, 1976 (for parking and new uses) and August 11, 1976) for time extension) were then pending.

50. On September 8 and September 21, 1976, respectively, at Petitioner's request, City staff members met with Petitioner and its architect to discuss Phase 2. On September 8, 1976, City staff members advised Petitioner to resubmit revised building plans to conform to current codes. No revised plans were submitted until October 15, 1976, 16 days before the October 31, 1976, deadline for start of construction.

City staff members further advised Petitioner that City would submit the revised plans to the International Conference of Building Officials (ICBO) in Whittier, California, for plan check because (1) there were numerous building code changes that required extensive review, (2) the revisions were complex, and (3) under then existing time constraints the City building inspector could not undertake the review and approval.

51. On October 1, 1976, Petitioner filed a request with the Commission to amend the Development Schedule by requesting

a one-year extension for start of construction of the six-story addition.

52. On October 20, 1976, Petitioner submitted an extensive letter to the Commission in support of its one-year extension request.

53. On October 27, 1976, the Commission held a public hearing in which all relevant issues were discussed by Petitioner, its counsel, members of the public, the City staff and the Commission (Exhibit 48). At the conclusion of the hearing, the Commission passed a motion recommending to the Council that the one-year request be denied.

54. On October 28, 1976, the City building inspector denied Petitioner's request for an interim building permit on the grounds that no use permit had yet been issued for Phase 2 and that no plans for construction of a parking structure had been submitted.

55. On December 7, 1976, the Council held a public hearing on Petitioner's one-year request. The request for extension was submitted to lengthy debate in which all relevant issues were discussed and in which Petitioner and its counsel, members of the public, members of the City STaff and Council members fully participated. The Chairperson of the Planning Commission described the Commission's reasons for denying the extension. These were: the unresolved parking problem, the ten-year length of time for completing the development, the advantage over others in granting an extension, the changed conditions of the area and height limitations that could be considered. Council members discussed and considered such subjects as the impact of the County condemnation action on the parking requirements, the economics of the project, building height limits, environmental impact reports, delays in completing the project, the interests of the community, the general changes in the city's comprehensive plan. The pros and cons from public

participants discussed added jobs and taxes to be derived from the building's construction on the one hand to the need for an environmental report and general opposition to the building and its proposed height on the other.

56. The Council thoroughly considered Petitioner's request at its meeting. The discussions and deliberations were complete and unhurried. The factual data the Council had before it fairly represented both sides of the issues. Petitioner was asked on two separate occasions if it had been dealt with in good faith by City. Both times the answer was affirmative.

57. On December 7, 1976, the Council following the hearing and its deliberations, denied Petitioner's request for a one-year extension. Pursuant to PC District Regulations §18.68.070(a) and 18.68.080, the Development Schedule is part of the Development Plan which, in itself, is the PC zoning. Any request to change to the Development Schedule is a request for a rezoning or an amendment to the PC zoning as established by Ordinance No. 2224.

58. At the time the Council denied Petitioner's one-year request, no building permit had been issued for construction of the six-story addition or the parking structure. The previously issued building permit expired on July 1, 1970, and the use permit on March 30, 1972.

59. There was never any act or intent on the part of any of Respondents to obstruct, hinder or delay Petitioner.

60. There was no deliberate or willful attempt to delay, hinder or obstruct Petitioner in the completion of either Phase 1 or Phase 2.

61. Petitioner did not commence construction on Phase by virtue of expending money to overbuild Phase 1 to accommodate it.

62. Respondents have acted conscientiously and in good

faith with Petitioner at all times.

63. None of Respondents' actions have been unreasonable, unlawful, arbitrary or discriminatory.

CONCLUSIONS OF LAW

From the foregoing findings of act, the Court makes the following conclusions of law:

1. Ordinance No. 2224 was a proper legilsative exercise of the police power through zoning. Zoning is not a contract.

2. Ordinance No. 2224 established a specially enacted zoning for the subject property which, from its effective date, prescribed a fixed, limited time period for start of construction for both Phase 1 and Phase 2.

3. There is nothing in Ordinance No. 2224, or law in general, which provided that the completion of Phase 1 guaranteed or vested any right to complete Phase 2.

4. The appropriate and applicable form of mandamus in this action is under California Code of Civil Procedure §1085. The City's actions in passing Ordinance No. 2224, Resolutions 3860 and 4055, and in considering Petitioner's requests for time extensions were legislative functions, not administrative orders or decisions which latter functions are reviewable under Code of Civil Procedure §1094.5.

5. The City Council in considering and deciding upon the request in this case to extend the ordinance was not acting in a quasi-judicial capacity but was performing a legislative function subject only to traditional mandamus review.

6. The decision regarding staff issuance of use permits under the City's PC zoning regulations is both ministerial in character and supplements the PC legislative process reviewable under Code of Civil Procedure §1085.

7. The decision whether or not to issue a building permit

involves a ministerial act reviewable under Code of Civil Procedure §1085.

8. The scope of review by the trial court in traditional mandamus actions (section 1085) requires only an examination into whether the action taken was arbitrary, capricious or entirely lacking in evidentiary support.

9. A city council in amending a zoning ordinance is not required to make express findings of fact as to the public purpose of the ordinance or its relation to the police power. Council members are not required to articulate for the record all of the reasons and motives behind their decisions.

10. No fundamental vested right was ever acquired by Petitioner. Absent such a right, the test of the City Council's action was whether there was substantial evidence to support it.

11. The action taken by the Council in denying the one-year request was supported by more than substantial evidence.

12. Petitioner did not acquire vested rights to construct Phase 2 by virtue of overbuilding Phase 1 to accommodate it or in any other respect.

13. Petitioner had not at any time acquired vested rights to a building permit to construct Phase 2; therefore, the Council's denial of the one-year extension did not constitute a deprivation of vested rights.

14. There is no basis for application of the doctrine of estoppel against Respondents.

15. None of Respondents' actions have been unreasonable, unlawful, arbitrary, discriminatory, malicious nor void, nor have such resulted in any denial of due process or equal protection of the laws.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 6, 1978.

JUDGE JOHN R. KENNEDY
Judge of the Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

COURT HOUSE PLAZA COMPANY, a limited partnership, Petitioner,	)	
v.	)	NO. P 32449
THE CITY OF PALO ALTO, a municipal corporation, et al., Respondents.	)	JUDGMENT DENYING PEREMPTORY WRIT OF MANDAMUS

This matter came regularly before this Court on Feburary 21, 1978 and following for hearing. Robert E. Cartwright appeared as attorney for petitioner and Fred Caploe appeared as attorney

for respondent. The record of the administrative proceedings having been received into evidence and examined by the Court, additional evidence having been received by the Court, arguments having been presented,

IT IS ORDERED that:

1. The petition filed in this action for a peremptory writ of mandamus is denied; and

2. Respondents shall recover their costs in this action.

Dated: July 7, 1978.

JUDGE JOHN R. KENNEDY
Judge of the Superior Court

Judgment entered on July 10, 1978.

John Kazubowski, Clerk
By: M. Thomas
Deputy Clerk

APPENDIX B

(1) Opinion of the California Court of Appeal, Fourth Appellate District, Division Three, filed on March 11, 1981

(2) Denial of Petition for Rehearing to California Court of Appeal, First Appellate District, Division Three

COURT HOUSE PLAZA COMPANY, Plaintiff and Appellant,

v.

CITY OF PALO ALTO et al., Defendants and Respondents.

Civ. 45375.

Court of Appeal, First A. District, Division 3.

March 11, 1981.

Developer appealed from judgment of the Superior Court, Santa Clara County, John R. Kennedy, J., denying its petition for writ of mandamus directing city to issue it use and building permits and extension of time for construction of parking facilities for six-story addition to its existing four-story building. The Court of Appeal, Scott, J., held that: (1) administrative mandamus was not proper remedy to review denial of one year extension; (2) denial of time extension was neither unreasonable, arbitrary or discriminatory, nor did it deny developer due process or equal protection of the laws; (3) city council's denial of developer's application for use and building permits for second phase of construction project was not arbitrary and capricious; (4) there was substantial evidence to support finding of trial court that there was no conspiracy among city staff and officials to delay and thwart developer's project as would estop city from denying developer use and building permits and extension of time to complete its buildings; and (5) "mere diminution" in property value due to a zoning action is not compensable.

Affirmed.

1. Administrative Law and Procedure ⇐741

Judicial review of adjudicatory act of administrative agency is a determination of whether agency has proceeded without or in excess of jurisdiction, whether there was fair trial and whether findings of agency were supported by substantial evidence in light of the entire record. West's Ann.Code Civ.Proc. § 1094.5.

2. Mandamus ⇐81

Administrative mandamus review of actions by administrative agencies is limited to those instances in which hearing is required by law before administrative agency.

3. Mandamus ⇐99

Since zoning ordinance provided that no hearing was required on request for one year extension, administrative mandamus was not proper remedy to review denial of extension. West's Ann.Code Civ.Proc. § 1094.5.

4. Mandamus ⇐172

Under rules applicable to traditional mandamus, judicial review is limited to examination of proceedings before agency to determine whether its action has been arbitrary or capricious, or entirely lacking in evidentiary support, or whether it has failed to follow procedure and give notices required by law. West's Ann.Code Civ.Proc. § 1085.

5. Zoning and Planning ⇐604

Denial of one year extension of zoning ordinance will be upheld if there is any reasonable basis in fact to support legislative determination of city council. West's Ann.Code Civ.Proc. § 1085.

6. Constitutional Law ⇐213.1(2)

Classification will not be deemed unreasonable and discriminatory if it is based upon some difference, or distinction, having substantial relation to legitimate public purpose; classification will not be set aside if any state of facts may reasonably be conceived to justify it and decision of legislative body, as to what is sufficient distinction to warrant classification, will not be overthrown by courts unless it is palpably arbitrary. West's Ann.Const. Art. 1, § 7.

7. Constitutional Law ⇐228.2, 278.2(1)
Zoning and Planning ⇐167

City council's denial of one year extension of zoning ordinance based on determination that, since developer had failed to diligently pursue completion of second

phase of project, good cause was not established, was neither unreasonable, arbitrary or discriminatory and did not deny developer due process or equal protection of the laws. West's Ann.Code Civ.Proc. § 1085; West's Ann.Const. Art. 1, § 7; U.S.C.A. Const. Amend. 14.

8. Zoning and Planning ⇐609

Motives of members of city council for denying extension of zoning ordinance are irrelevant to determination of whether council's decision was arbitrary and capricious.

9. Mandamus ⇐87

Ordinary mandamus is particularly appropriate to compel issuance of building and use permits since they are generally ministerial in character. West's Ann.Code Civ. Proc. § 1085.

10. Zoning and Planning ⇐378

City council's denial of developer's application for use and building permits for second phase of construction project was not arbitrary and capricious since original zoning ordinance was not tantamount to contract with petitioner permitting him to complete ten-story building, and since petitioner did not acquire vested right to construct ten-story building by virtue of expenditures allegedly made in good-faith reliance on valid building and use permits.

11. Zoning and Planning ⇐376

Where building permit to erect specific type of building is issued by county or city and permittee acts upon it and incurs obligations, or in good faith commences construction, his rights become vested and governmental body is thereafter estopped to set up zoning ordinance subsequently enacted.

12. Zoning and Planning ⇐762

Discriminatory conduct by land use agencies may engender estoppel independently of developer's acquisition of vested right.

13. Zoning and Planning ⇐762

There was substantial evidence to support finding of trial court that there was no conspiracy among city staff and officials to delay and thwart developer's construction project as would estop city from denying developer use and building permits and extension of time to complete its buildings.

14. Eminent Domain ⇐2(1.2)

"Mere diminution" in property value due to a zoning action is not compensable. West's Ann.Const. Art. 1, § 19; U.S.C.A. Const. Amend. 5.

Robert E. Cartwright, Cartwright, Sucherman, Slobodin & Fowler, Inc., San Francisco, for plaintiff and appellant.

Roy C. Abrams, City Atty., Louis B. Green, Asst. City Atty., City of Palo Alto, Palo Alto, Fred Caploe, A Professional Corp., Martinez, for defendants and respondents.

SCOTT, Associate Justice.

Court House Plaza Company appeals from a judgment denying its petition for a writ of mandamus directing respondent City of Palo Alto to issue it use and building permits and an extension of time for the construction of parking facilities for a six-story addition to its existing four-story building.

The chronology of this case spans some 12 years beginning with the adoption by the City of Palo Alto of Ordinance No. 2224 on December 28, 1964, establishing a planned community zoning district. By its terms appellant was authorized to construct a building in two phases. The first phase (hereafter Phase 1) required construction of the first four stories on Parcel A and the first two levels of a parking structure on Parcel C to begin by January 28, 1967. In the second phase (hereafter Phase 2) construction was to begin by October 31, 1976, on six additional stories of the building and on additional levels of the parking garage. Only the four-story building has been completed.

In August 1965 the city was informed that another part of appellant's property was to be condemned by the County of

Santa Clara for a county road project (Page Mill-Birch Street realignment) which would interfere with appellant's plans to construct a parking structure. Accordingly, on December 13, 1965, the city approved construction of Phase 1 with 107 temporary off-street parking spaces in lieu of the permanent parking structure. Thereafter, on June 14, 1966, a building permit was issued for construction of the four-story building, almost a year after an application for the permit had been filed. By August 1967, the construction of Phase 1 had been completed. On December 11, 1967, the city gave appellant until December 13, 1968, to begin construction of the parking structure. The four-story building was fully functioning and substantially leased by the spring of 1968.

In March of 1970, use and building permits for Phase 2 were approved. Other than fabrication of the steel and manufacture of the elevators, no construction work was undertaken on either the six-story addition or the parking structure, and following the granting of extensions of the permits, both permits expired.

In August of 1970, the County of Santa Clara completed its condemnation of a portion of Parcel C for the Page-Mill realignment. In 1973 a 50-foot height limit was enacted for all buildings in Palo Alto except those in planned community districts.

Appellant requested a zone change on June 30, 1976, to resolve the parking problem which ensued from the county's partial taking of Parcel C. Then on August 11, 1976, appellant requested a three-year extension of the development plan, which was denied by the planning commission on August 25, 1976. No appeal was taken from this denial. Instead, appellant applied for a use permit on August 30, 1976. On the next day, apparently mindful that under the original zoning ordinance appellant was to have commenced construction by October 31, 1976, appellant filed an application for a building permit on the basis of the 1968 plans. The building inspector refused to issue a building permit on the ground that the plans did not conform to the then existing building codes. The use permit was also held up due to the 14-foot height variation.

Appellant sought a one-year extension on October 1, 1976. The request was denied by the planning commission and this was appealed to the city council. On October 28, 1976, the city building inspector denied appellant's request for an interim building permit on the grounds that no use permit had been granted and no plans for construction of a parking structure had been submitted. Finally, on December 6, 1976, following a public hearing, the city council denied appellant's request for a one-year extension.

It is the city's denial of appellant's application for use and building permits for the Phase 2 construction, and the denial of appellant's request for a one-year extension of its time to act under the zoning ordinance that are the subject matter of this litigation. Appellant then filed a petition in superior court for a writ of mandate, which was denied. This appeal followed.

Appellant sought relief from the trial court under sections 1085 and 1094.5 of the Code of Civil Procedure. The court concluded that while only section 1085 was applicable, appellant failed to establish its right to relief under either section 1085 or 1094.5.

I. DENIAL OF EXTENSION OF TIME TO COMPLY WITH ZONING ORDINANCE

[1, 2] Appellant contends that the action of the city on its application for a one-year extension was adjudicatory in nature and as such was reviewable under the administrative mandamus provision of Code of Civil Procedure section 1094.5. Judicial review of an adjudicatory act of an administrative agency is a determination of whether the agency has proceeded without or in excess of jurisdiction, whether there was a fair trial, whether the findings of an agency were supported by substantial evidence in light of the entire record. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32, 112 Cal.Rptr.

805, 520 P.2d 29.) However, administrative mandamus review of actions by administrative agencies is limited to those instances in which a hearing is *required by law* before the administrative agency. It is the facts adduced at that hearing and the findings made thereon which are the subject of judicial review under administrative mandamus. In the instant case, however, it appears that the actions in denying appellant's request for a one-year extension to comply with the zoning ordinance followed from a proceeding before the City of Palo Alto, wherein no hearing was required by law. The Palo Alto Municipal Code, section 18.68.080(D) provides that "for good cause shown by the property owner . . . the planning commission, *without a public hearing*, may recommend a change or extension of the time limits imposed by the development schedule. Upon receipt of the recommendation . . . the city council may change or extend the time limits." (Emphasis added.) The statute confers authority upon the planning commission to make a determination of whether good cause exists without providing a hearing. This determination is merely advisory in that the city council ultimately acts upon the question and it may, but is not required to, adopt the recommendation. Although the city council held a public hearing in the instant case, none was *required by law*.

[3] Since the ordinance provides that no hearing is required, administrative mandamus is not the proper remedy. Therefore, the action of respondent must be evaluated under the rules applicable to traditional mandamus pursuant to Code of Civil Procedure section 1085.

[4] Actions taken by respondent in its legislative capacity are reviewable under Code of Civil Procedure section 1085, the traditional writ of mandate. Judicial review is limited to an examination of the proceedings before the agency to determine whether its action has been arbitrary or capricious, or entirely lacking in evidentiary support, or whether it has failed to follow the procedure and give the notices required by law. (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 833, 27 Cal.Rptr. 19, 377 P.2d 83; *Patterson v. Central Coast Regional Com.* (1976) 58 Cal.App.3d 833, 840, 130 Cal.Rptr. 169.)

We turn now to a determination of whether there is substantial evidence to support the trial court's determination that the denial of appellant's request for a one-year extension of the zoning ordinance was not arbitrary and capricious.

In support of these arguments appellant alleges that (1) the city acted arbitrarily in requiring appellant to begin the administrative process anew despite its vested rights, (2) the city granted extensions in virtually all other cases in which extensions were required, and (3) the planning commission and the city council applied the wrong standard in adjudging its request for an extension by substituting a "changed circumstances" standard for the "good cause" standard set forth in Palo Alto Municipal Code section 18.68.080(D).

[5] The denial of the one-year extension will be upheld if there is any reasonable basis in fact to support the legislative determination of the city council. (*Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 460-461, 202 P.2d 38, cert. den. 337 U.S. 939, 69 S.Ct. 1516, 93 L.Ed. 1744; *Ensign Bickford Realty Corp. v. City Council* (1977) 68 Cal.App.3d 467, 475, 137 Cal.Rptr. 304.) "Every intendment is in favor of the validity of the exercise of the police power." (*Id.*, at p. 474, 137 Cal.Rptr. 304.)

In order to have obtained an extension of time appellant was required to establish "good cause" for its failure to comply with the original time limits imposed by the development schedule. (Palo Alto Mun. Code, § 18.68.080(d).) The city council denied the extension on several grounds. One councilman indicated that traffic would likely be increased, creating undesirable effects. He also believed that general changes in Palo Alto embodied in the comprehensive plan supported denial of the extension. Another council member thought the "fragility" of the residential character of the neighborhood would be threatened by the high rise.

Still another council member stated that the time given the appellant within which to construct the ten-story building was longer than any other that had been granted. Thus, there is substantial evidence to support the trial court's determination that the decision of the city council was not arbitrary and capricious.

Nevertheless, appellant contends that the city's denial was discriminatory when compared with the city's actions as to numerous other projects for which time extensions were requested and granted. Two declarations were submitted to the trial court which indicate that between 1961 and 1976, 11 planned community property owners were granted an extension of the development schedule. Two of the planned community districts were particularly similar to appellant's project.

[6] It is true that persons or entities similarly situated may not be unjustly discriminated against by the government. (Cal.Const., art. I, § 7; *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, 103, 48 Cal. Rptr. 889, 410 P.2d 393, cert. den., 384 U.S. 988, 86 S.Ct. 1890, 16 L.Ed.2d 1005; see also *Yick Wo v. Hopkins* (1885) 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.) However, a classification will not be deemed unreasonable and discriminatory "if it is based upon some difference, or distinction, having a substantial relation to a legitimate public purpose. [Citations.] The classification will not be set aside if any state of facts may reasonably be conceived to justify it. [Citation.] And the decision of a legislative body, as to what is a sufficient distinction to warrant the classification, will not be overthrown by the courts unless it is palpably arbitrary." (*City & County of San Francisco v. Pace* (1976) 60 Cal.App.3d 906, 910-911, 132 Cal. Rptr. 151.)

[7] The trial court had before it the declarations alluded to above and numerous exhibits in support thereof. After reviewing that evidence the court determined that in light of all the circumstances the denial of the extension was reasonable and that the city had not discriminated against appellant by denying the request.

[8] Contrary to appellant's contention, the motives of the members of the city council for denying an extension are irrelevant. (See *McCarthy v. City of Manhattan Beach* (1953) 41 Cal.2d 879, 264 P.2d 932.)

Appellant's argument that the city council failed to apply the correct standard in determining whether an extension should be granted also lacks merit.

According to Palo Alto Municipal Code section 18.68.080(D), extensions need not be automatically granted upon the showing of "good cause," nor does this section limit the city council's determination to consider matters going only to "good cause." In order to obtain the extension an applicant *first* must establish sufficient cause for being unable to comply with the deadline specified in the development schedule. But even if such cause is shown, the council still has discretion to deny the request for additional time where other reasons are of significant magnitude to vitiate the applicant's showing of good cause.

In the present case, the minutes of the city council hearing indicate that the council recognized that it could in its discretion grant the extension if good cause were shown. However, it is also apparent that the council did not feel that such had been established, since appellant had failed to diligently pursue completion of Phase 2. As previously discussed, there were a number of factors making construction of Phase 2 undesirable at that time without further evaluation.

We conclude that the denial of the time extension was neither unreasonable, arbitrary or discriminatory, nor does it deny appellant due process or the equal protection of the laws. There is no contention that respondent failed to follow the procedures and give the notices required by law.

II. DENIAL OF USE AND BUILDING PERMITS

Appellant also challenges the city's denial of the use and building permits.

[9] Ordinary mandamus is particularly appropriate to compel the issuance of building and use permits since they are generally ministerial in character. (*Ellis v. City Council* (1963) 222 Cal.App.2d 490, 498, 35 Cal.Rptr. 317; *Sunset View Cemetery Assn. v. Krantz* (1961) 196 Cal.App.2d 115, 116–124, 16 Cal.Rptr. 317; *McCombs v. Larson* (1959) 176 Cal.App.2d 105, 106–107, 1 Cal.Rptr. 140; *Palmer v. Fox* (1953) 118 Cal.App.2d 453, 455–459, 258 P.2d 30; compare *Agnew v. City of Los Angeles* (1961) 190 Cal.App.2d 820, 827, 12 Cal.Rptr. 507.)

Palo Alto has adopted section 302 of the Uniform Building Code, which provides that a building permit will be issued if the development plans submitted with the application comply with existing laws. The issuance of the permit is not left to the discretion of the building inspector; it is only when the plans are not up to code that the permit may be denied. Section 1085 applies.

Likewise, Palo Alto Municipal Code section 18.68.040 states that upon payment of a fee "a use permit *shall* be issued without a public hearing if the proposed structure or structures comply with the development plan and conditions thereof." (Emphasis added.) It is apparent that issuance is mandatory once it is determined that the applicant has complied with a previously approved development plan. The fact that the zoning administrator may impose conditions on the permit does not change the essentially ministerial character of the zoning administrator's function.

A. *Contract right to permits*

Appellant contends that denial of building and use permits was arbitrary and capricious because the original zoning ordinance adopted in 1964 was tantamount to a contract with appellant permitting him to complete a ten-story building.

However, the contract theory of zoning was expressly disapproved in *Richter v. Board of Supervisors* (1968) 259 Cal.App.2d 99, 108, 66 Cal.Rptr. 52, where the court stated: "It is settled that zoning regulations are not contracts and may be modified from time to time [citations]. Thus, a county or municipality may amend its zoning ordinance as new and changed conditions warrant and require such revisions [citations]." (See also *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546.)

When the city enacted Ordinance No. 2224, it reserved the right to pass on details before construction could begin and to determine that appellant's plans were in compliance with all current codes at the time the permit was to be issued. Appellant assumed the risk that new or amended regulations not contemplated at the time the project began might prevent the construction appellant originally planned.

B. *Vested right to permits*

[10] In the alternative, appellant urges that denial of the building and use permits was arbitrary in view of its vested rights to construct the ten-story building. Appellant contends that it acquired vested rights on any of the following grounds: (1) by overbuilding Phase 1 to accommodate Phase 2, (2) by making substantial expenditures in good faith reliance on the 1970 building permit, and/or (3) by making good faith expenditures in the absence of a building permit.

The California Supreme Court has stated the vested rights rule as follows: "It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. (*Dobbins v. City of Los Angeles* (1904) 195 U.S. 223 [25 S.Ct. 18, 49 L.Ed. 169]; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776, 784 [194 P.2d 148].)" (*Avco Community Developers, Inc. v. South Coast Regional Com., supra*, 17 Cal.3d at p. 791, 132 Cal.Rptr. 386, 553 P.2d 546.) However, "neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparato-

ry to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued." (*Avco*, at p. 793, 132 Cal.Rptr. 386, 553 P.2d 546.)

[11] The vested rights doctrine was founded upon an estoppel theory. "Where a building permit to erect a specific type of building is issued by a county or city and the permittee acts upon it and incurs obligations, or in good faith commences construction, his rights become vested and the governmental body is thereafter estopped to set up a zoning ordinance subsequently enacted. [Citation.] Where no such permit has been issued it is difficult to conceive of any basis for such estoppel." (*Anderson v. City Council* (1964) 229 Cal.App.2d 79, 89, 40 Cal.Rptr. 41.)

Here appellant maintains that in constructing Phase 1 it expended in excess of $450,000 to accommodate Phase 2. The foundation and structural steel used in Phase 1 are adequate to support all ten stories. The plans and specifications also included many features which would only be required for a completed ten-story building, such as two additional elevator shafts and a machine room in the basement to accommodate additional elevator machinery. By virtue of these expenditures, which were made in good faith reliance on valid building and use permits, it acquired vested rights to construct the ten-story building.

We do not question the appellant's good faith in making these expenditures nor do they appear insubstantial, but we cannot accept that the Phase 1 permits and the expenditures made in reliance thereon conferred an unalterable right to complete Phase 2. The Phase 1 permits were expresaly limited to construction of the first four stories and basement. Upon completion of that portion of the building the permits were marked "completed."

Once the appellant here had made substantial expenditures in reliance on the Phase 1 permits, it acquired a vested right to complete the four-story building "in accordance with the terms of the permit" (*Avco*, 17 Cal.3d at p. 791, 132 Cal.Rptr. 386, 553 P.2d 546), but no such right ripened as to Phase 2 for which no permits or other final approvals were obtained. Appellant essentially assumed the risk that the building might not be completed as planned since it was never exempted from the requirement of further permits and approvals before the six-story addition could be constructed, or from complying with all subsequently enacted codes.

Appellant next contends that it obtained vested rights to complete the ten-story building under the Phase 2 building and use permits issued in 1970, which permits ultimately expired. In reliance thereon, appellant states it expended over $500,000 on preparation of the plans and specifications and the purchase of structural steel and elevators for construction of Phase 2. This figure was in addition to the $450,000 it had already spent on Phase 1 in order to accommodate Phase 2.

Respondents contest appellant's characterization of its expenditures, claiming that most of appellant's Phase 2 debts were incurred before the building permit was issued in February 1970.

The trial court found that the Phase 2 construction debts were incurred some 18 months before the first building permit for Phase 2 was issued. In reviewing the record it appears that appellant's then managing partner ordered complete architectural drawings early in 1968, and they were completed by fall. The steel and elevators were ordered in late 1969. Appellant was thus contractually bound even before it applied for the building permit on December 1, 1969. Notwithstanding that some of the steel and elevators may have been fabricated after February 16, 1970, appellant did not rely on an existing permit when it obligated itself for the fabrication. Appellant's expenditures were not made in reliance on an existing permit but rather in anticipation of one.

Appellant attempts to avoid the conclusion that no vested rights accrued under its 1970 permits by arguing that if the city had

acted promptly the building permit should have issued considerably sooner and most of the expenditures would have been made *following* the issuance of the permit. Appellant cites *California Central Coast etc. Conservation Com. v. McKeon Construction* (1974) 38 Cal.App.3d 154, 112 Cal.Rptr. 903, in support of its position. There the court in dictum stated that vested rights would have accrued if the building permit had not been arbitrarily withheld for almost eight months after an application had been made.

Here the delay which prevented appellant from acquiring a permit earlier than it did was the smoke-proof tower controversy which arose on December 22, 1969, when the city fire marshal determined that certain building code requirements had not been met. The city had previously, in 1965, resolved a similar dispute in appellant's favor within three weeks time by permitting construction of Phase 1 with an interior smoke-proof tower. The 1969 controversy lasted approximately six weeks and was also resolved in appellant's favor.

Unlike *McKeon*, the short delay here was not arbitrary and there was no pretext to prevent appellant from obtaining its building permit. There are no grounds for holding that a building permit "should have been" issued earlier, thus allowing vested rights to accrue. Furthermore, the 1970 permits expired without appellant's having built in accordance with their terms. Appellant cannot six years later assert that it continues to have a vested right to the expired permit.

III. CONSPIRACY TO DELAY BUILDING

Appellant next urges a "conspiracy" among the officials and staff of Palo Alto arose in 1972 to delay and thwart completion of its project. Therefore, such actions estop the city from denying appellant the use and building permits and the extension of time to complete its building.

[12] It is well settled that discriminatory conduct by land use agencies may engender an estoppel independently of a developer's acquisition of a vested right. (See *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 124–125, 109 Cal.Rptr. 799, 514 P.2d 111; *Raley v. California Tahoe Regional Planning Agency* (1977) 68 Cal.App.3d 965, 978–982, 137 Cal.Rptr. 699; *Morgan v. County of San Diego* (1971) 19 Cal.App.3d 636, 641, 97 Cal.Rptr. 180; *G & D Holland Construction Co. v. City of Marysville* (1970) 12 Cal.App.3d 989, 994–995, 91 Cal.Rptr. 227; *Russian Hill Improvement Assn. v. Board of Permit Appeals* (1967) 66 Cal.2d 34, 37, fn. 5, 56 Cal.Rptr. 672, 423 P.2d 824.)

[13] Appellant cites various evidence which he contends supports his theory that there was conspiracy among the employees of respondent city to thwart completion of the project. The evidence was conflicting as to why various acts took place and appellant contends this supports his theory of conspiracy. The city employees denied any efforts made for the purpose of delaying, frustrating or otherwise thwarting the project. The trial court did not find a conspiracy from the conflicting testimony, and there is substantial evidence to support that finding.

[14] Appellant's final argument sounds in inverse condemnation. While both the Federal and State Constitutions provide that private property may not be taken or damaged for public use without payment of just compensation to its owner (Cal.Const., art. I, § 19; U.S.Const., 5th Amend.), a "mere diminution" in property value due to a zoning action is not compensable. (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 273–274, 157 Cal.Rptr. 372, affd. 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).)

Judgment is affirmed.

WHITE, P. J., and DEAL, J., concur.

Court of Appeal of the State of California

IN AND FOR THE

First Appellate District

Division THREE

Court House Plaza Co., etc.,
Plaintiff and Appellant,
vs.
City of Palo Alto, et al.,
Defendants and Respondents.

No. 45275

Superior Court No. _____

BY THE COURT:

The petition for rehearing is denied.

Dated _____

_____ P.J.

APPENDIX C

Denial of Petition for Rehearing by the California Supreme Court, filed on May 13, 1981

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

MAY 13 1981

I have this day filed Order

HEARING DENIED

In re: 1 Civ. *No.* 45375

Court House Plaza Company

vs.

City of Palo Alto

Respectfully

Clerk

APPENDIX D

Notice of Appeal to United States Supreme Court, filed August 4, 1981

ROBERT E. CARWRIGHT, ESQ.
CARTWRIGHT, SUCHERMAN, SLOBODIN
& FOWLER, INC.
160 Sansome Street, Suite 900
San Francisco, California 94104
Telephone: 415/433-0440

Attorneys for Petitioner and Appellant

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

COURT HOUSE PLAZA COMPANY, *Petitioner and Appellant,*	
v.	No. 1 Civil No. 45375
THE CITY OF PALO ALTO, ET AL., *Respondents.*	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that COURT HOUSE PLAZA COMPANY, Petitioner and Appellant above, hereby appeal to the Supreme Court of the United States from the final judg-

ment of the Supreme Court of the State of California, entered in this action on May 13, 1981, denying hearing after decision by the Court of Appeal, First Appellate District.

This appeal is taken pursuant to 28 U.S.C. & 1257(2).

Dated: August 5, 1981

CARTWRIGHT, SUCHERMAN, SLOBODIN & FOWLER, INC.

By /s/ Robert E. Cartwright
ROBERT E. CARTWRIGHT,
Attorneys for Petitioner and Appellant

APPENDIX E

(1) Ordinance No. 2224 of the City of Palo Alto

(2) Zoning Code Sections of the City of Palo Alto

ORDINANCE NO. 2224

ORDINANCE OF THE CITY OF PALO ALTO AMENDING SECTION 3.02 OF ORDINANCE NO. 1324, THE ZONING ORDINANCE, CHANGING THE ZONING OF CERTAIN PROPERTY KNOWN AS 2655, 2705 AND 2723 BIRCH STREET AND 251, 271, 276, 278, 280 AND 296 SHERIDAN AVENUE FROM R-3:P TO P-C TO ALLOW PROFESSIONAL AND COMMERCIAL OFFICES, AGENCIES AND USES

The Council of the City of Palo Alto does ORDAIN as follows:

SECTION 1. Ordinance No. 1324, the Zoning Ordinance, is hereby amended by amending Section 3.02, the "Zoning Map", by changing the zoning of certain property known as 2655, 2705 and 2723 Birch Street and 251, 271, 276, 278, 280 and 296 Sheridan Avenue from R-3:P to P-C to allow Professional and Commercial Offices, Agencies and Uses.

SECTION 2. A map describing said affected property and the zone change contemplated hereby and a Development Plan under Section 16.07 of the Zoning Ordinance are affixed hereto, marked EXHIBIT A and by reference made a part hereof.

SECTION 3. The Development Plans, Drawing No. 1 entitled "Area Map" dated 9-22-64; Drawing No. 2 entitled "Office Building Floor Plans A" dated 9-22-64; Drawing No. 4 entitled "Elevation" dated 9-24-64; Drawing No. 5R entitled "Parking Garage Floor Plan" dated 11-12-64; Drawing No. 6R entitled "Construction Phasing" dated 11-12-64 are approved with the exception of the portion of the subject property identified as "Lot Area B" known as 2601 Birch Street in accordance with the following conditions:

(1) Development Schedule

(a) Phase 1. Start of construction of the 4-story office building on "Lot Area A," and the parking garage on

"Lot Area C" within two (2) years of Council approval.

(b) Phase 2. Start of construction of the 5th to and including the 10th story on "Lot Area A" and additional levels on the parking garage on "Lot Area C" by October 31, 1976.

(2) Permitted Uses

1. Accountants
2. Advertising Agencies
3. Architects
4. Artists
5. Associations and/or Clubs
6. Attorneys
7. Banks
8. Bookkeeping and Tax Service
9. Collection Agency
10. Commercial Parking Lots and Garages
11. Consultants — management and investments
12. Contractor's offices (exclude yards)
13. Credit Service Agency
14. Dentists
15. Electronics' Representatives
16. Engineers — civil and consulting
17. Engineers — construction office, designing and development, structural office
18. Insurance — general, life, broker
19. Manufacturers' Representatives
20. Physicians and Surgeons
21. Psychologists
22. Publishers — (general office)
23. Real Estate — appraisers, brokers, consultants
24. Research — general offices, marketing, consultants
25. Restaurant

26. Savings and Loan Companies
27. Secretarial Services — light printing
28. Social Clubs
29. Tabulating — statistical
30. Title companies

(3) Structures

Building location, dimensions, heights and other improvements shall be substantially as indicated on the approved Development Plan.

(4) Site

Lot coverage, open area, landscaping and access driveways shall be substantially as indicated on the approved Development Plan.

(5) Off-Street Parking

There shall be one (1) off-street parking space for each one hundred forty-four (144) square feet of net usable floor area of the ground floors and one (1) parking space for each two hundred eighty-eight (288) square feet of net usable floor area on upper floors. Minimum dimension of parking spaces, aisle and access space shall be as provided in Section 4.51 of the Zoning Ordinance, except that the minimum width of each parking space shall be nine (9) feet.

SECTION 4. This ordinance shall become effective upon the expiration of thirty days from its passage.

INTRODUCED: December 14, 1964

PASSED: December 28, 1964

AYES: Arnold, Beahrs, Byxbee, Comstock, Cooley, Dias, Porter, Rodgers, Rohrs, Rus, Woodward, Zweng.

NOES: Debs, Flint.

ABSENT: Cresap.

ATTEST:

/s/ Shirley Kilgore
City Clerk, Acting

APPROVED:

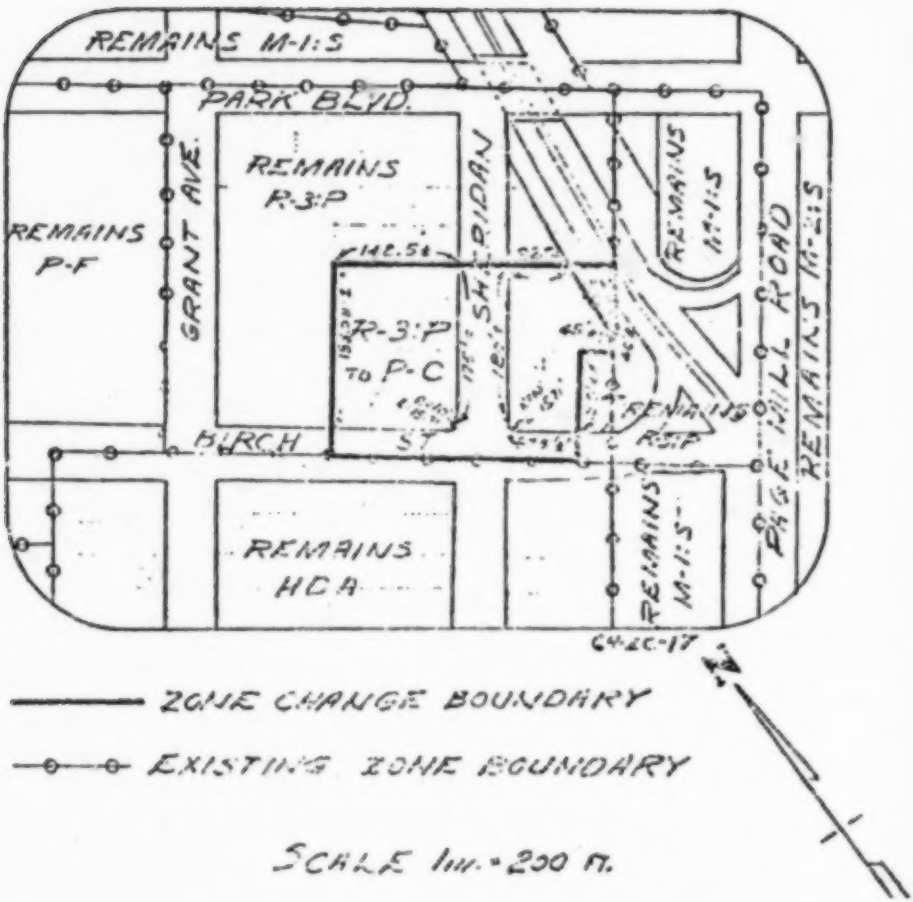
/s/ B. Woodward
Mayor

APPROVED AS TO FORM:

/s/ Robert E. Michalski
City Attorney

APPROVED AS TO CONTENT:
/s/ Louis J. Fourcroy
Planning Department

Change of District for Property at 2655, 2705, and 2723 Birch Street and 231, 271, 276, 278, 280, and 296 Sheridan Avenue - 9-17-64.



POSTED 1000 SCALE ZONE MAP
600 " " "
200 " OFFICIAL MAP
200 " LAND USE MAP

KEY SECTIONS OF PALO ALTO MUNICIPAL CODE TITLE 18 ZONING

Chapter 18.68
P-C PLANNED COMMUNITY DISTRICT REGULATIONS

*****

18.68.010 Purpose. The P-C district is designed to accommodate various types of development such as neighborhood and district shopping centers, professional and administrative areas, multiple housing developments, single-family residential developments, commercial service centers and industrial parks or any other use or combination of uses which can be made appropriately a part of a planned development.

*****

18.68.030 Uses permitted. All and any uses are permitted in a P-C district provided such use or uses are shown on the development plan for the particular P-C district as approved by the city council. *****

18.68.040 Uses requiring use permits. A use permit shall be required for any and all uses in a P-C district *****. Upon payment of the fee required by Section 18.90.040 for use permits, a use permit shall be issued without a public hearing if the proposed structure or structures comply with the development plan and conditions thereof. The zoning administrator may impose additional conditions and requirements on the use permit as he deems necessary to secure the purposes of this title and the approved development plan. If the applicant is

aggrieved by the action of the zoning administrator through his denial of the use permit or conditions imposed thereon, he may appeal such denial or conditions under the procedures set forth in Chapter 18.92. *****

18.68.050 Height and space requirements. Maximum height and bulk and minimum setback, yard, parking and loading requirements shall be established for each P-C district by the development plan approved by the city council. *****

18.68.060 Establishment of P-C districts. P-C districts may be established or removed from the zone map upon the application of a property owner or owners or upon the initiative of the city council or planning commission in accordance with the procedures set forth in Chapter 18.98. *****

18.68.070 Development plan. An application for a P-C district shall include and be accompanied by a development plan which, if approved by the city council, shall become a part of the zoning map of the city of Palo Alto as provided for by Section 18.08.040.

(a) Changes in the development plan shall be considered the same as changes in the zoning map and shall be made in accordance with the procedures set forth in Chapter 18.98 of this title, except that such change may be accomplished by city council resolution rather than the passage of an ordinance or, when applicable, by the final decision of the director of planning, pursuant to Chapter 18.99 of this title, for administrative approval of minor changes in projects.

(b) The development plan shall include:

(1) A map showing any street systems and lot design proposed within the district. *****

(4) A plot plan for each building site or sites in the proposed P-C district or any portion thereof, as required by the

zoning administrator. ***** The required plot shall show the approximate location of all proposed buildings, indicating maximum and minimum distances between buildings and between buildings and property or building site lines, and shall indicate the general location and type of landscaping. *****

(a) Off-street parking and loading plan.*****

(6) Elevations and/or perspective drawings of all proposed structures *****. Such drawings need not be the result of final architectural decisions and need not be in detail. The purpose of such drawings is to indicate, within stated limits, the height of proposed buildings and the general appearance of the proposed structures to the end that the entire development will have architectural unity.*****

18.68.080 Development schedule. A. An application for a P-C district shall be accompanied by a development schedule indicating to the best of the applicant's knowledge the approximate date on which construction of the project can be expected to begin, the anticipated rate of development and completion date. The development schedule, if approved by the city council, shall become a part of the development plan and shall be adhered to by the owner of the property in the P-C district and his successors in interest.

B. From time to time the zoning administrator shall compare the actual development accomplished in the various P-C districts with the approved development schedules and shall report his findings to the planning commission.

C. If in the opinion of the planning commission the owner or owners of property in P-C districts are failing or have failed to meet the approved development schedule, the commission may initiate proceedings under Chapter 18.98 to remove the P-C district from the zoning map or to amend the development plan.

D. For good cause shown by the property owner in writing, prior to the expiration of the original time schedule for the development, the planning commission, without a public hearing, may recommend a change or extension of the time limits imposed by the development schedule. Upon receipt of the recommendation of the planning commission, the city council may change or extend the time limits imposed by the development schedule. *****

Chapter 18.90
VARIANCES AND USE PERMITS

*****

18.90.050 Public hearing—Time of hearing. Upon the filing of such application, the zoning administrator shall set the matter for public hearing and such hearing shall be within thirty days of the filing of such application. *****

18.90.060 Public hearing—Notice. (a) A notice of such hearing shall be mailed to the applicant, and to each occupant and person to whom is assessed the property within two hundred fifty feet of the exterior limits of the property involved. *****

18.90.070 Public hearing—Decision. At the time and place set for such hearing the zoning administrator shall hear evidence for and against such application, shall make findings and shall take such action as in his opinion is indicated by such evidence. Each hearing shall be open to the public. He may continue from time to time any hearing held by him. A decision shall be rendered by the zoning administrator within ten days after conclusion of the hearing, ***** (Ord. 1521 (part), 1954: Ord. 1324 *****

18.90.120 Revocation—Extension. *****

A use permit or a variance which has not been used within one year after the date of granting thereof becomes nuli and void and of no effect unless specifically issued for a longer time period. The zoning administrator may, without a hearing, extend such time for an additional year only upon application filed with him before the expiration of the first year. *****

Chapter 18.92
APPEALS

*****

18.92.010 Appeal. An appeal may be taken to the planning commission by any person, firm or corporation aggrieved or affected by any determination of the zoning administrator. *****

18.92.020 Filing—Procedure. An appeal shall be in writing and filed in duplicate with the city clerk within ten days after the mailing of notice of the decision of the zoning administrator. *****

18.92.030 Hearing date—Notice. Upon receipt of the appeal, the city clerk shall set the appeal for hearing at a meeting of the planning commission to be held for such purpose not more than four months thereafter. Notice of such hearing shall be given in the same manner as provided in Chapter 18.90 for notice of hearing by the zoning administrator. *****

18.92.040 Stay of proceedings. Filing of an appeal shall stay all proceedings in furtherance of the action appealed from until the determination of the appeal as provided herein. *****

18.92.050 Hearing on appeal. Upon the date set therefor the planning commission shall hold a public hearing of the appeal unless, for cause, the commission shall on that date continue the matter. Upon the hearing of such appeal the commission shall hear evidence, make findings and recommend to the city council that the decision appealed from be affirmed, changed or modified, or in lieu thereof, make such other or additional recommendations as it shall deem proper in the premises, subject to the same limitations as are placed on the zoning administrator by this title. *****

18.92.060 Recommendation to city council. The findings of the planning commission shall be submitted in the form of a recommendation to the council and placed on the agenda of the next regular council meeting by the city clerk. *****

18.92.070 Action by city council. Upon the receipt of the recommendation of the planning commission the city council may, if it so desires, hold a public hearing of the matter in the same manner as provided for public hearings by the zoning administrator, or may consider the appeal without a hearing. In conformity with the provisions of this title, the council may by motion reverse or affirm wholly or partly, or may modify any decision, determination or requirement of the commission and may make such decision or determination or may impose such conditions as the facts warrant, and its decision or determination shall be final. *****

Chapter 18.98
AMENDMENTS, ALTERATIONS, CHANGES IN DISTRICTS

*****

18.98.010 Conditions requiring zone changes. This title may be amended by changing the boundaries of districts or by changing any other provision thereof whenever the public interest, health, safety, morals, peace, comfort, convenience or general welfare may so require. *****

18.98.020 Manner of initiating. Changes in the district boundaries may be initiated as follows:

(a) By motion of the city council on its own initiative;

(b) By motion of the planning commission on its own initiative; or

(c) By application of a property owner. *****

18.98.030 Application by property owner. An application for a change of district may be made by a record owner of the parcel of property for which a change is sought or by a purchaser thereof under a contract in writing duly executed and acknowledged by both the buyer and the seller, by a lessee in possession thereof, with the written consent of the owner of record of the legal title to make such application, or by the agent of any of the foregoing, duly authorized in writing. The application must be in writing on a form supplied by the division of planning. *****

18.98.060 Notice of public hearing. The planning commission shall give notice of the time and place of such hearing and the purpose thereof *****

18.98.070 Public hearing. *****

The recommendation of the commission to the council shall be in writing and shall set forth fully the findings and determinations of the commission on the matter involved. A decision shall be rendered within a reasonable time and a recommendation shall be filed with the council within seven days after the decision is rendered by the planning commission. *****

18.98.080 Powers of the city council upon recommendation. Upon receipt of the recommendation of the planning commission as provided herein, the city council shall consider the same and may change or refuse to change the classification of any property as requested or recommended and its decision thereon shall be final and conclusive. If the city council so desires it may hold a public hearing on the matter in the same manner as provided in Section 18.98.070 hereof where applicable. If the classification of any property is to be changed an ordinance shall accordingly be passed and thereupon the zoning administrator shall change the official zoning map in conformity therewith. *****

18.98.090 Initiative of the city council or the planning commission. The city council may, be a minute order, request the planning commission to consider any property; or the planning commission may, of its own initiative, consider such a change. In either case the planning commission shall proceed as though an application for change had been filed with the planning department as provided in Section 18.98.030 hereof. *****

Chapter 18.99
ADMINISTRATIVE APPROVAL OF MINOR CHANGES IN PROJECTS

*****

18.99.010 Purpose of chapter. The purpose of this chapter is to provide a uniform and orderly procedure for expeditious administrative approval of minor changes to existing projects and plans. (Ord. 2927 § 1 (part), 1976.)

18.99.020 Definition of minor change. "Minor change" means an alteration or modification of an existing plan, development or project which is inferior in bulk, degree, or importance to the overall dimension and design of the plan, development, or project, with no change proposed for the use of the land in question, no change proposed in the character of the structure or structures involved, and no exception or variance required. (Ord. 2927 § 1 (part), 1976.)

18.99.030 Applicability of chapter. (a) Type of applications. This chapter shall apply to applications for a minor change to the following:

(1) An approved development plan for a planned community district pursuant to Chapter 18.68 of this title; *****

APPENDIX F

(1) Exhibit 18, Inter-office Communication of City of Palo Alto of February 3, 1979

(2) Exhibit 120, Letter of City of Palo of May 23, 1968, by Donald G. Mooney, Assistant City Attorney

F-1

CITY OF PALO ALTO

INTER-OFFICE COMMUNICATION

To: City Manager Date: February 3, 1970

From: Sr. Assistant City Attorney Department:

SUBJECT: California Lands Building
260 Sheridan Avenue

Please find attached a copy of a letter which is being sent to Mr. Dunn concerning the smokeshaft problem regarding the above reference property. Mr. Dunn, his architect, Mr. Hoover, and his attorney, Mr. Cliff, have agreed to those conditions.

As you know, this rulling comes from this office on the basis that Ordinance 2224 contemplated the 10 story building with an interior smokeshaft and the development plan attached to the ordinance specifically shows a 10 story building with no exterior smokeshaft. This understanding was confirmed by Mr. Keithley's letter of June 4, 1965. Therefore, it would appear that certain rights vested. Those rights are with respect to a building with an interior smokeshaft, which building is unsprinklered. It should be noted here that henceforth all P-C ordinances, most particularly those which contemplate development in phases, will include language similar to or identical with the following:

> "All construction under this ordinance shall be in accordance with applicable building and fire codes in effect at the time that the building permit for each phase of building is issued."

We are confident that this language would eliminate any future problems of a similar nature.

PETER G. STONE

PGS.rb
cc: Chief Building Official
Assistant Building Official
Assistant Fire Chief
Fire Marshal

Office of the City Attorney May 23, 1968

Mr. W. G. Dunn
California Lands Investment Company
430 Cambridge Avenue
Palo Alto, California

Re: City of Palo Alto Resolution No. 4113
(P-C Development for Property Known as
260 Sheridan Avenue - Palo Alto).

Dear Mr. Dunn:

In answer to the question from your lender, the offset of violation of the Development Schedule in the P-C plan, as amended by Resolution No. 4113, simply means that the Development Plan would become defunct and that before any construction is undertaken, application must be made for an amendment extending the Development Schedule.

Thus, in the sense that compliance with the Development Plan is necessary to avoid its lapse, construction of the permanent structure must start on or before October 21, 1976. However, this does not mean that the City of Palo Alto has any right, either under its own municipal code or under State law, to require specific performance on the developer in the form of construction of the building, or to sue for damages.

The lapse of the Development Plan can be prevented by applying for an extension of the Development Schedule if necessary. While this letter should not and cannot be construed as a commitment on the part of the City of Palo Alto to grant such further extensions, inasmuch as this authority is vested in the City Council, these extensions have, in fact, customarily been granted. The reason for this is simply that the City is not any more interested than the owners in having a development remain half completed.

The date in the Resolution coincides with the date for commencement of construction of the rest of the stories of the office building itself. Thus, the only real and practical effect of failure to start building the parking structure according to the Development Schedule in Resolution No. 4113 is to cause the *entire second phase portion* of the Development Plan to lapse,

so that if any more construction is undertaken, it would be after a new Development Schedule of both buildings satisfactory to the City.

Very truly yours,
JAMES A. HILDEBRAND
City Attorney

BY DONALD G. MEANEY
Assistant City Attorney

BSM:km

cc: Planning Officer
City of Palo Alto

APPENDIX G

Article in "IN BRIEF" official Bulletin of the Santa Clara County Bar Association vol. 18 no. 2, entitled "Take My Property Please: The Inverse Condemnation Remedy" by Jeffrey P. Widman.

Take My Property, Please: The Inverse Condemnation Remedy

By Jeffrey P. Widman ©*1981*

INTRODUCTION

On March 24, 1981, the United States Supreme Court announced its decision *San Diego Gas & Electric Co. v. City of San Diego*,[1] the appeal which was supposed to have spelled out the fate of California's innovations in the law of inverse condemnation. *San Diego Gas*, however, literally decided nothing about California law, at least not in the plurality opinion of Justice Blackmun. All the action took place in the dissent. There Justice Brennan stole center stage with a fervent reaffirmation of the inverse condemnation remedy — money for a taking of land. Because the four dissenters, by adding Justice Rehnquist's sympathetic concurring vote, may become the future majority, the *San Diego Gas* case may herald the future resurgence of inverse condemnation under the banner of supreme federal law.

I. *The Federal Background.*

During the fifty or so years following *Pennsylvania Coal Company v. Mahon*[2] and *Euclid v. Ambler Realty Co.*,[3] almost nothing of earthshaking magnitude occurred in the law of inverse condemnation. But then in 1978 the Supreme Court began to show renewed interest in re-thinking the test for a taking of property through police-power regulation. The majority opinion in *Penn Central Transportation Company v. City of New York* (written, significantly, by Justice Brennan) spawned a new catch-phrase possessing yet unexplored meaning – interference with a landowner's "distinct investment-backed expectations."[4] That phrase apparently was intended to lend a measure of financial practicality to Justice Holmes' fine-sounding aphorism that "if regulation goes too far it will be recognized as a taking."[5] But *Penn Central* did not abandon *Pennsylvania Coal*: Justice Brennan simply multiplied the expressions of the essentially economic test for a taking.

After *Penn Central* the Supreme Court continued to accept inverse

condemnation cases for review. Its decision in *Kaiser Aetna v. United States*[6] can be viewed as an illustration of what constitutes an interference with a landowner's "distinct investment-backed expectations." The regulation challenged in *Kaiser Aetna* created a federal navigational easement through a private lagoon which the landowner had developed for the use of residents in its project along the shore. In effect, the federal government had transformed the lagoon into an aquatic playground for the enjoyment of all citizens. The Court, speaking through Justice Rehnquist, had no difficulty recognizing a palpable taking under those facts: The government had taken the owner's "right to exclude" the public. Because *Kaiser-Aetna* could be classified as a case of physical invasion by government through a regulation serving merely as a Trojan horse, the decision contributed little to the reformulation of the test for a regulatory taking.

At any rate, Justice Rehnquist himself had no trouble distinguishing *Kaiser-Aetna* in his opinion in *Pruneyard Shopping Center v. Robins*[7] "Physical invasion" by the public does not signal a taking in every case, Justice Rehnquist reminded us.[8] It is only when depriving the landowner of his "right to exclude" the public impairs the commercial use of the property that the courts will call a constitutional foul. Does the test of a taking, therefore, depend mainly upon the landowner's business program; that is, whether he plans to invite the public onto his land indiscriminately or selectively or not at all? If so, what about the regulation that prohibits the landowner from doing any commercial business whatsoever?

Though esoteric, *Andrus v. Allard*[9] did address the validity of a regulation prohibiting commercial use. In *Allard*, the federal government restricted commercial sales of Indian artifacts composed of bird feathers from species protected by two federal statutes. Observing that the owners retained the artifacts, and could of course continue "to possess and transport their property, and to donate or devise the protected birds",[10] the Court explained that the regulation did not effect any taking of property by prohibiting sale of the artifacts -- obviously their most profitable use. The opinion in *Allard*, written by Justice Brennan, exhumed the medieval figure-of-speech portraying the "bundle" of rights held by an owner: Government's removing one "strand" (or was it "stick"?) from the "bundle" does not constitute a taking, Justice Brennan explained, so long as the owner has some left.[11] The Court did not say how many must be left to prevent a taking. Figurative expression has a way of making logic seem unnecessary or, at least, presumptively present.

The Supreme Court clearly had only begun work on the reformulation of the test for a taking. Justice Rehnquist, for one, remained sceptical. After dissenting in *Penn Central* on the ground that government must, short and simple, pay for whatever it in fact takes, including diminished property value, no matter what the value of the property remaining,[12] he chided in *Kaiser-Aetna* that "the life of the law has not been logic, it has been experience."[13] Unfortunately for the Court and its Justices during the past half century, the "experience" has proven eclectic. The Court's decisions remain, for that reason, unsatisfying to those who at least hunger for logic in their lives.

II. *The California Experiment.*

Meanwhile, back in the warmer climate of California, our own Supreme

Court began to generate some modern thoughts on not only the test for a taking, but also the appropriate remedy under the Fifth Amendment. First, in *Selby v. County of San Buenaventura*,[14] the California supreme Court gave its blessing to long-range land-use planning mandated by statute. Because a general plan covers a span of at least a decade, and remains subject to modification, the court held in *Selby* that a general plan has no immediate impact upon the use of the land and therefore cannot effect a taking by regulation in any sense.[15] But that reasoning left unanswered the question whether a zoning or rezoning, which obviously does have an immediate impact upon land use, could effect a taking.

Responding in *HFH, Ltd. v. Superior Court*,[16] the court held that the rezoning of land from commercial to single-family residential did not result in a taking of property, because the landowner had admittedly substantial value left ($75,000 out of $400,000 potential sales proceeds). Moreover, the court reasoned, the landowner retained a use for his land, albeit not the one which would yield the greatest profit.[17] By rejecting a taking claim predicated upon the loss of the highest potential value of the land, the California court rescued cities from a subtle form of intimidation inherent in the inverse condemnation remedy: Give me my project or buy my land for its development value.

Footnote No. 16 in the *HFH* opinion soon became better known than the opinion itself. There the Supreme Court commented: "This case does not present, and we therefore do not decide, the question of entitlement to compensation in the event a zoning regulation forbade substantially *all* use of the land in question. We leave the question for another day."[18] Treating deprivation of "substantially all use" as the touchstone for liability did not surprise anyone greatly. After all, that tentative formulation of the test more or less corresponded to what in practice the United States Supreme Court had done many times, both before and after *Pennsylvania Coal*, in sustaining regulations enacted for a legitimate purpose. Indeed, *HFH* bore great resemblance to *Euclid v. Ambler Realty Co.* factually, although the latter involved a suit for declaratory relief not damages. The shock in footnote 16 came from the questioning of the monetary remedy itself.

Finally, the footnote became the law. On March 14, 1979, the California Supreme Court, in *Agins v. City of Tiburon*[19] confirmed that a zoning ordinance would not result in a taking unless it deprived the landowner of substantially all use. But for a historic climax, the court announced that, when a taking did occur, the landowner would not receive monetary damages. Without exaggeration, one can say that the *Agins* decision left California cities virtual masters of their own destiny in the field of land-use regulation. 'Doing it over again right' is a far more comfortable expiation for violating the Constitution.

Recounting a chronicle of acts by Tiburon betraying its imputed acquisitory intent, the Agins alleged that the rezoning of their land from residential to an open-space zone had rendered economically infeasible any residential development they might undertake. This attack, however, ran squarely into two obdurate facts: First, the new open-space zoning, while requiring preservation of some areas in their natural state, did not preclude all residential use. Indeed, depending upon topography and project design, the landowner might still have received approval for at least one house, and perhaps as many as five houses, on his five acres. Second, the landowner

had never sought that approval. Hence the City had never applied the new zoning to the land. Naturally, the City charged the landowner with a "failure to exhaust administrative remedies."

In affirming the trial court's sustaining of the City's demurrer, the California Supreme Court put in another way: The landowner had challenged the constitutionality of the ordinance *on its face* only; and, because the open-space zoning by its express terms allowed *some* use of the land, the landowner *ipso facto* retained some remaining value and so stated no claim for a taking.[20] Nor did the California court see any need for a trial on the taking issue. Although the court did not say it precisely in these terms, no landowner should be permitted to address arguments on economic unfeasibility to a court if he has not first tried to argue the city itself into giving him a practical use of his land.

As the *coup de grace*, the California Supreme Court cut away the traditional remedy for a taking – hard cash. Some plaintiffs' attorneys would have liked to regard the court's discussion of available remedies as *mere dicta*. After all, the trial court had never conducted a trial, much less awarded damages; there was no money judgment to reverse. But the court's announcement in *Agins* that henceforth only mandamus or a suit for declaratory relief remained as remedies for a regulatory taking definitely possessed the tone of a marching order to the California judiciary.

III. *Two Close Encounters In Washington.*

A. *Agins, Federal Style.*

Certainly the United States Supreme Court must have believed the California court had meant what it said. The Supreme Court accepted the landowner's appeal in *Agins*.[21] The Court did so, it was generally believed, because the *Agins* opinion squarely raised the issue of remedy for a taking. Already familiar with the New York's experimentation with a preferred invalidation remedy,[22] perhaps the Court saw an opportunity to resolve the conflict between Fifth Amendment rights and the perceived fiscal troubles of cities, New York and California cities included, during the 1970's.

The briefs submitted to the Court devoted their most creative arguments and strongest language to the remedy issue. Agins and their *amici* deprecated the invalidation remedy as (1) unconstitutional; (2) ineffective, supposedly because it gives a city a second chance to redo the same wrong another way; (3) time-consuming or, under the professional's rule that time is money, too costly; and (4) an abdication of judicial responsibility by the California courts. For their part, Tiburon and its *amici* responded, consonant with the new policy expressed by the California court, that invalidation (a) eliminates the offending regulation and so removes the occasion for "just compensation" under the Fifth Amendment; (b) leaves control of the public treasury in the hands of local legislators (not judges); (c) encourages imaginative land-use planning by removing the risk of unintended takings; and (d) comports with the way the world spins in a modern age of environmental and fiscal crisis. Surely these arguments on remedy offered the Court enough prime meat to feast nine constitutional appetites.

To the surprise of most and the disappointment of some (on appellant's side), the Supreme Court rejected the offering. The Court affirmed the decision below, without reaching the question of remedy.[23] Indeed, the Court essentially agreed with the California Supreme Court that the

landowner's attack on the ordinance failed, as a matter of law, because the ordinance was valid *on its face* as a legitimate exercise of the police power preserving an apparent residential use. Nothing in the record excused the landowner from applying for (and proving he could not obtain) that beneficial use.

The Court, however, did phrase the test of taking somewhat differently from the California Court: The opinion suggested, but did not technically hold, that an ordinance would effect a taking if it "denies an owner economically viable use of his land." This phrase had also appeared in the *Penn Central* opinion.[25] Its recurrence signalled the Court's major concern, on the liability issue, with the economic effect of regulation on remaining *use* as opposed to the remaining *holding value* of the land. After all, could anyone find, during the inflationary 1970's, a parcel of real estate having no holding value whatsoever, even in its original (God-forsaken) condition? The Court could not let real-estate speculation repeal, in practice, the law of takings.

Clearly the Court would welcome a case bearing both issues ripe for a judicial bite -- the monetary remedy and the proven economic infeasibility of land use under the challenged regulation.

B. *San Diego Gas & Electric*: *Time-Bomb or Dud*?

The Court had but a few weeks to wait. On June 16, 1980, exactly six days after the *Agins* decision, the Court accepted the appeal in *San Diego Gas & Electric Co. v. City of San Diego*. The Court did so not by noting "probable jurisdiction," but rather by postponing "further consideration of the question of jurisdiction" to "the hearing of the case on the merits."[26]

The case, we now learn, is dismissed for lack of federal jurisdiction. Had the Court again missed the problem of finality, overlooking the fact that the Court of Appeal's decision under challenge had remanded the case to the trial court and authorized a trial (if the landowner elected) on declaratory relief and mandamus? Or was the Court still troubled by a factual resemblance to *Agins*? For, while the trial court had specifically found that any application for development would have been in vain, the Company really had never approached San Diego with a proposed project under the City's open-space plan.

These questions come naturally to any reader of the plurality opinion. To be generous, one must concede that the judicial history of *San Diego Gas* was confusing enough to bedazzle eyes searching for the remedy issue. While the regulatory details remain meaningful to only those well-versed in California's zoning and general-planning laws, the case in its broadest terms did present the imposition of open-space regulations on low-lying wetlands formerly designated for industrial development. Moreover, the city had clearly tried to raise funds, through a defeated bond issue, to acquire the land for a public park. Most importantly, the landowner had won a trial on the merits and had been awarded damages for inverse condemnation on October 8, 1976. Perhaps, then, the lack of any development application would not prove fatal as it had in *Agins*. Was not the Company really aggrieved by the California Supreme Court's having taken away its monetary damages while the case remained on appeal? And was not that 'taking' more than a mere procedural change -- actually a change in substantive constitutional rights?

In terms of chronology, the *San Diego* case was (1) affirmed by the

Fourth District Court of Appeal on June 13, 1978; (2) accepted for hearing by the California Supreme Court on July 13, 1978; (3) remanded to Fourth District by the Supreme Court for further consideration "in light of our decision in" *Agins* on July 14, 1979; and (4) remanded by the Fourth District to the trial court on June 26, 1979 in an unpublished opinion. Thankfully, that opinion spoke ambiguously to the nine justices still searching for a takings touchstone. Under the opinion by the Court of Appeal, would or could the trial court make further factual findings relevant to the taking issue in trying the declaratory relief or mandamus claims?

Yes, the majority of the Court persuaded themselves. Surely, the Court of Appeal would want the trial court to reconsider, 'in light of *Agins*' of course, its finding of fact that any development application to the City would have proven futile.[27] This answer, I think, is wrong. The trial judge in 1976 had found all facts necessary to conclude that the application was futile, and the property taken. Conceivably, on remand the trial judge might find other facts peculiarly pertinent to the remedies available in the suits for declaratory relief and mandamus. But that is all. Nothing new had occurred to alter the findings of fact already made. Exploiting all available vagueness, the Supreme Court's reading of the Court of Appeal's opinion gives the impression of a pretext for avoiding a full-blown Fifth Amendment decision.

The minority — Justices Brennan, Marshall, Powell and Stewart — were ready to launch their thesis on inverse condemnation. Justice Brennan's statements on the Fifth Amendment received the approval of Justice Rehnquist in his concurring opinion, although he sided with the majority on the decisive 'final judgment' issue.[28] The future majority of five in favor of a monetary remedy is now identified. If one adds Justice Blackmun's aside, in the plurality opinion, that "the federal constitutional aspects" of the "monetary remedy" issue "are not to be cast aside lightly," one can raise the count from five to perhaps a unanimous nine.[29]

IV. *The Future Seen Through the Dissenters' Glass*

Among the nine justices differences remain, I suspect, on the definition of the test for a taking. Differences may remain also on the *measure* of monetary damages; for example, whether the landowner should be compensated for the lost development potential of his land, or only for his direct investment in that development, or only for lost time preceding the invalidation of the regulation. Justice Brennan's dissenting opinion suggests, at least, a probable answer to this latter issue.

First, some monetary remedy for landowners proving the invalidity of a regulation as applied to their land. At minimum the measure of damages will conform to Justice Brennan's proposed standard in the minority opinion:

> In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.[30]

This standard for partial temporal takings leaves open many questions.

Giving the landowner the rental value of an existing structure for the interim period is an easy solution. But what if the offending regulation prevented replacement or expansion of the building with a more lucrative improvement? Or what if the regulation delayed development of raw, idle land? Even Justice Brennan was not confident that existing authority on partial takings offers complete answers to such questions. He acknowledged that "additional rules may need to be developed."[31] He also invited the states to implement his proposed rule, "provided that their chosen procedures and remedies comport with the fundamental constitutional command." *Id.*

Second, some of the justices, led by Justice Rehnquist, may continue to press for a monetary remedy compensating the landowner for lost development potential (diminution from higher-use value) actually caused by an invalid regulation. This approach would logically allow the government to continue the regulation in effect by paying for a permanent taking of the lost value. But Justice Rehnquist's approach might also give the government no choice but to pay. I cannot yet identify a majority of five for this approach.

Third, a possible retreat from the twin perils of earlier Fifth Amendment jurisprudence — repeal the regulation or buy the fee (at fair market value). Certainly Justice Brennan wanted to give government a choice — formally condemn the land, keep the regulation while paying just compensation, or repeal the regulation while paying interim damages — *after* an adverse judgment.[32] He carefully avoided the harshest form of inverse condemnation — a judgment at once declaring the regulation unconstitutional and making government the (surprised) owner of the fee, liable for "just compensation." Justice Brennan's description of the Fifth Amendment as "self-executing" need not be read too literally.[33]

Fourth, a continued assimilation of the law on "takings" into federal tort law, as represented by recent Supreme Court decisions under the Civil Rights Act (42 U.S.C. §§1983, 1985).[34] This is really a large and separate topic. It is best left, in the familiar words of the Court, "for another day" — better, for the next decade.

CONCLUSION

The minority opinion in *San Diego Gas* declares that "just compensation" for a taking of property means money, not an intangible social benefit and also not an alternative remedy consistent with some 'just' social policy perceived by the judiciary. The minority opinion also revives the concept that a taking is a kind of 'wrong,' not because it represents a denial of due process, but rather because it is automatically compensable. Erasing the injury will not serve. Government must also repair the harm done when it enacted the regulation. Some money must go to the landowner. By contrast, the California Supreme Court in *HFH* and *Agins* carefully divorced its redefined concept of "inverse condemnation" from any concept of "wrong." What, now, California?

It is unlikely that California can resist the impending reaffirmation of a monetary remedy by the federal courts. But it is equally unlikely that we will soon read a recantation by the California Supreme Court. The Legislature may notice Justice Brennan's invitation: Create a means of compensating the landowner for his losses while saddled with an invalid regulation and

then, perhaps, the United States Supreme Court will not need to decide the next son of *Agins*. Invitations such as that are a glove on an iron fist.

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1. U.S. Docket No. 79-678.
2. 260 U.S. 393 (1922).
3. 272 U.S. 365 (1926).
4. 438 U.S. 104, 124, (1978).
5. 260 U.S. 393, 415.
6. __ U.S. __ 100 S. Ct. 383 (1979).
7. __U.S. __ 100 S. Ct. 2035 (1980).
8. __U.S.__ 100 S. Ct. 2035, 2041-42.
9. __ U.S. __ 100 S. Ct. 318 (1979).
10. __ U.S. __ 100 S. Ct. 318, 327.
11. *Id.* According to Justice Rehnquist in *Pruneyard*, 100 S.Ct. 2035, 2041, the correct metaphor is "stick." Justice Rehnquist has the stronger claim to historical accuracy. Does Justice Brennan's choice of "stranda" betray some modern attenuation of the landowner's rights?
12. 438 U.S. 104, 139.
13. __ U.S. __ 100 S. Ct. 383, 391.
14. 10 Cal.3d 110 (1973).
15. 10 Cal.3d 110, 127-28.
16. 15 Cal.3d 508 (1975).
17. 15 Cal.3d 508, 523.
18. 15 Cal.3d 508, 518, n.16.
19. 24 Cal.3d 266.
20. 24 Cal.3d 266,277.
21. __ U.S. __ 100 S. Ct. 658 (Jan. 7, 1980).
22. From the Court's review of the New York Court of Appeal's decision in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) and perhaps also from the Court's denial of review *Fred F. French Investing Co. v. City of New York*, 39 N.Y. 2d 587, 385 N.Y. S.2d 5, *cert. denied and appeal dism'd*, 429 U.S. 990 (1976).
23. __ U.S. __ 100 S. Ct. 2138, 2143 (1980).
24. __ U.S. __ 100 S. Ct. 2138, 2141.
25. The Court quoted the phrase used by counsel for New York City at oral argument, 438 U.S. 104, 139 n.36. The Court itself employed, among other quasi-economic expressions, "reasonable beneficial use." *Id.*
26. __ U.S. __, 100 S.Ct. 3008 (1980).
27. Slip Op'n (Blackmun, J.), p.10.
28. Slip Op'n (Rehnquist, J.), p.1.
29. Slip Op'n (Blackmun, J.), p.11.
30. Slip Op'n (Brennan, J.), p.18.
31. Slip Op'n (Brennan, J.), p.24.
32. Slip Op'n (Brennan, J.), p.22.
33. Slip Op'n (Brennan, J.), p.18
34. *E.g. Owen v. City of Independence*, __ U.S. __ 100 S. Ct. 1398 (1980) (city liable) for damages and without "good-faith" defense in suit by former police chief for his termination without due process of law).

Appendix

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81-404

FILED
AUG 29 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. _____

COURT HOUSE PLAZA COMPANY,
Appellant,

v.

CITY OF PALO ALTO ET AL.,
Appellees.

On Appeal From The Supreme Court Of California

SUPPLEMENT TO APPENDIX TO JURISDICTIONAL STATEMENT

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August 1981

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APPENDIX G:

Article in "IN BRIEF" Official Bulletin of the Santa Clara County Bar Association vol. 18 no. 2, entitled "Take My Property Please: The Inverse Condemnation Remedy" by Jeffrey P. Widman G-1

APPENDIX B

(1) Opinion of the California Court of Appeal, Fourth Appellate District, Division Three, filed on March 11, 1981

(2) Denial of Petition for Rehearing to California Court of Appeal, First Appellate District, Division Three

B-1

COURT HOUSE PLAZA COMPANY,
Plaintiff and Appellant,

v.

CITY OF PALO ALTO et al., Defendants
and Respondents.

Civ. 45375.

Court of Appeal, First A. District,
Dividion 3.

March 11, 1981.

Developer appealed from judgment of the Superior Court, Santa Clara County, John R. Kennedy, J., denying its petition for writ of mandamus directing city to issue it use and building permits and extension of time for construction of parking facilities for six-story addition to its existing four-story building. The Court of Appeal, Scott, J., held that: (1) administrative mandamus was not proper remedy to review denial of one year extension; (2) denial of time extension was neither unreasonable, arbitrary or discriminatory, nor did it deny developer due process or equal protection of the laws; (3) city council's denial of developer's application for use and building permits for second phase of construction project was not arbitrary and capricious; (4) there was substantial evidence to support finding of trial court that there was no conspiracy among city staff and officials to delay and thwart developer's project as would estop city from denying developer use and building permits and extension of time to complete its buildings; and (5) "mere diminution" in property value due to a zoning action is not compensable.

Affirmed.

Robert E. Cartwright, Cartwright, Sucherman, Slobodin & Fowler, Inc., San Francisco, for plaintiff and appellant.

Roy C. Abrams, City Atty., Louis B. Green, Asst. City Atty., City of Palo Alto, Palo Alto, Fred Caploe, A Professional Corp., Martinez, for defendants and respondents.

SCOTT, Associate Justice.

Court House Plaza Company appeals from a judgment denying its petition for a writ of mandamus directing respondent City of Palo Alto to issue it use and building permits and an extension of time for the construction of parking facilities for a six-story addition to its existing four-story building.

The chronology of this case spans some 12 years beginning with the adoption by the City of Palo Alto of Ordinance No. 2224 on December 28, 1964, establishing a planned community zoning district. By its terms appellant was authorized to construct a building in two phases. The first phase (hereafter Phase 1) required construction of the first four stories on Parcel A and the first two levels of a parking structure on Parcel C to begin by January 28, 1967. In the second phase (hereafter Phase 2) construction was to begin by October 31,1976, on six additional stories of the building and on additional levels of the parking garage. Only the four-story building has been completed.

In August 1965 the city was informed that another part of appellant's property was to be condemned by the County of Santa Clara for a county road project (Page Mill-Birch Street realignment) which would interfere with appellant's plans to construct a parking structure. Accordingly, on December 13, 1965, the city approved construction of Phase 1 with 107 temporary off-street parking spaces in lieu of the permanent parking structure. Thereafter, on June 14, 1966, a building permit was issued for construction of the four-story building, almost a year after an application for the permit had been filed.

By August 1967, the construction of Phase 1 had been completed. On December 11, 1967, the city gave appellant until December 13, 1968, to begin construction of the parking structure. The four-story building was fully functioning and substantially leased by the spring of 1968.

In March of 1970, use and building permits for Phase 2 were approved. Other than fabrication of the steel and manufacture of the elevators, no construction work was undertaken on either the six-story addition or the parking structure, and following the granting of extensions of the permits, both permits expired.

In August of 1970, the County of Santa Clara completed its condemnation of a portion of Parcel C for the Page-Mill realignment. In 1973 a 50-foot height limit was enacted for all buildings in Palo Alto except those in planned community districts.

Appellant requested a zone change on June 30, 1976, to resolve the parking problem which ensued from the county's partial taking of Parcel C. Then on August 11, 1976, appellant requested a three-year extension of the development plan, which was denied by the planning commission on August 25, 1976. No appeal was taken from this denial. Instead, appellant applied for a use permit on August 30, 1976. On the next day, apparently mindful that under the original zoning ordinance appellant was to have commenced construction by October 31, 1976, appellant filed an application for a building permit on the basis of the 1968 plans. The building inspector refused to issue a building permit on the ground that the plans did not conform to the then existing building codes. The use permit was also held up due to the 14-foot height variation.

Appellant sought a one-year extension on October 1, 1976. The request was denied by the planning commission and this was appealed to the city council. On October 28, 1976, the city building inspector denied appellant's request for an interim building permit on the grounds that no use permit had been

granted and no plans for construction of a parking structure had been submitted. Finally, on December 6, 1976, following a public hearing, the city council denied appellant's request for a one-year extension.

It is the city's denial of appellant's application for use and building permits for the Phase 2 construction, and the denial of appellant's request for a one-year extension of its time to act under the zoning ordinance that are the subject matter of this litigation. Appellant then filed a petition in superior court for a writ of mandate, which was denied. This appeal followed.

Appellant sought relief from the trial court under sections 1085 and 1094.5 of the Code of Civil Procedure. The court concluded that while only section 1085 was applicable, appellant failed to establish its right to relief under either section 1085 or 1094.5.

I. DENIAL OF EXTENSION OF TIME TO COMPLY WITH ZONING ORDINANCE

Appellant contends that the action of the city on its application for a one-year extension was adjudicatory in nature and as such was reviewable under the administrative mandamus provision of Code of Civil Procedure section 1094.5. Judicial review of an adjudicatory act of an administrative agency is a determination of whether the agency has proceeded without or in excess of jurisdiction, whether there was a fair trial, whether the findings of an agency were supported by substantial evidence in light of the entire record. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal. 3d 28, 32, 112 Cal. Rptr. 805, 520 P. 2d 29.) However, administrative mandamus review of actions by administrative agencies is limited to those instances in which a hearing is *required by law* before the administrative agency. It is the facts adduced at that hearing and the finding made thereon which are the subject of

judicial review under administrative mandamus. In the instant case, however, it appears that the actions in denying appellant's request for a one-year extension to comply with the zoning ordinance followed from a proceeding before the City of Palo Alto, wherein no hearing was required by law. The Palo Alto Municipal Code, section 18.68.080(d) provides that "for good cause shown by the property owner . . . the planning commission, *without a public hearing,* may recommend a change or extension of the time limits imposed by the development schedule. Upon receipt of the recommendation . . . the city council may change or extend the time limits." (Emphasis added.) The statute confers authority upon the planning commission to make a determination of whether good cause exists without providing a hearing. This determination is merely advisory in that the city council ultimately acts upon the question and it may, but is not required to, adopt the recommendation. Although the city council held a public hearing in the instant case, none was *required by law.*

Since the ordinance provides that no hearing is required, administrative mandamus is not the proper remedy. Therefore, the action of respondent must be evaluated under the rules applicable to traditional mandamus pursuant to Code of Civil Procedure section 1085.

Actions taken by respondent in its legislative capacity are reviewable under Code of Civil Procedure section 1085, the traditional writ of mandate. Judicial review is limited to an examination of the proceedings before the agency to determine whether its action has been arbitrary or capricious, or entirely lacking in evidentiary support, or whether it has failed to follow the procedure and give the notices required by law. (*Pitts v. Perluss* (1962) 58 Cal. 2d 824, 833, 27 Cal. Rptr. 19, 377 P. 2d 83; *Patterson v. Central Coast Regional Com.* (1976) 58 Cal. App. 3d 833, 840, 130 Cal. Rptr. 169.)

We turn now to a determination of whether there is substantial evidence to support the trial court's determination that the denial of appellant's request for a one-year extension of the zoning ordinance was not arbitrary and capricious.

In support of these arguments appellant alleges that (1) the city acted arbitrarily in requiring appellant to begin the administrative process anew despite its vested rights, (2) the city granted extensions in virtually all other cases in which extensions were required, and (3) the planning commission and the city council applied the wrong standard in adjudging its request for an extension by substituting a "changed circumstances" standard for the "good cause" standard set forth in Palo Alto Municipal Code section 18.68.080(D).

The denial of the one-year extension will be upheld if there is any reasonable basis in fact to support the legislative determination of the city council. (*Lockard v. City of Los Angeles* (1949) 33 Cal. 2d 453, 460–461, 202 P. 2d 38, cert. den. 337 U.S. 939, 69 S. Ct. 1516, 93 L. Ed. 1744; *Ensign Bickford Realty Corp. v. City Council* (1977) 68 Cal. App. 3d 467, 475, 137 Cal. Rptr. 304.) "Every intendment is in favor of the validity of the exercise of the police power." (*Id.*, at p. 474, 137 Cal. Rptr. 304.)

In order to have obtained an extension of time appellant was required to establish "good cause" for its failure to comply with the original time limits imposed by the development schedule. (Palo Alto Mun. Code, §18.68.080(d).) The city council denied the extension on several grounds. One councilman indicated that traffic would likely be increased, creating undesirable effects. He also believed that general changes in Palo Alto embodied in the comprehensive plan supported denial of the extension. Another council member thought the "fragility" of the residential character of the neighborhood would be threatened by the high rise. Still another council member stated

that the time given the appellant within which to construct the ten-story building was longer than any other that had been granted. Thus, there is substantial evidence to support the trial court's determination that the decision of the city council was not arbitrary and capricious.

Nevertheless, appellant contends that the city's denial was discriminatory when compared with the city's actions as to numerous other projects for which time extensions were requested and granted. Two declarations were submitted to the trial court which indicate that between 1961 and 1976, 11 planned community property owners were granted an extension of the development schedule. Two of the planned community districts were particularly similar to appellant's project.

It is true that persons or entities similarly situated may not be unjustly discriminated against by the government. (Cal. Const., art. I, §7; *City of Bakersfield v. Miller* (1966) 64 Cal. 2d 93, 103, 48 Cal. Rptr. 889, 410 P. 2d 393, cert. den., 384 U.S. 968, 86 S. Ct. 1890, 16 L. Ed. 2d 1005; see also *Yick Wo v. Hopkins* (1885) 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.) However, a classification will not be deemed unreasonable and discriminatory "if it is based upon some difference, or distinction, having a substantial relation to a legitimate public purpose. [Citations.] The classification will not be set aside if any state of facts may reasonably be conceived to justify it. [Citation.] And the decision of a legislative body, as to what is a sufficient distinction to warrant the classification, will not be overthrown by the courts unless it is palpably arbitrary." (*City & County of San Francisco v. Pace* (1976) 60 Cal. App. 3d 906, 910–11, 132 Cal. Rptr. 151.)

The trial court had before it the declarations alluded to above and numerous exhibits in support thereof. After reviewing that evidence the court determined that in light of all the circumstances the denial of the extension was reasonable and

that the city had not discriminated against appellant by denying the request.

Contrary to appellant's contention, the motives of the members of the city council for denying an extension are irrelevant. (See *McCarthy v. City of Manhattan Beach* (1953) 41 Cal. 2d. 879, 264 P. 2d 932.)

Appellant's argument that the city council failed to apply the correct standard in determining whether an extension should be granted also lacks merit.

According to Palo Alto Municipal Code section 18.68.080(D), extensions need not be automatically granted upon the showing of "good cause," nor does this section limit the city council's determination to consider matters going only to "good cause." In order to obtain the extension an applicant *first* must establish sufficient cause for being unable to comply with the deadline specified in the development schedule. But even if such cause is shown, the council still has discretion to deny the request for additional time where other reasons are of significant magnitude to vitiate the applicant's showing of good cause.

In the present case, the minutes of the city council hearing indicate that the council recognized that it could in its discretion grant the extension if good cause were shown. However, it is also apparent that the council did not feel that such had been established, since appellant had failed to diligently pursue completion of Phase 2. As previously discussed, there were a number of factors making construction of Phase 2 undesirable at that time without further evaluation.

We conclude that the denial of the time extension was neither unreasonable, arbitrary or discriminatory, nor does it deny appellant due process or the equal protection of the laws. There is no contention that respondent failed to follow the procedures and give the notices required by law.

II. DENIAL OF USE AND BUILDING PERMITS

Appellant also challenges the city's denial of the use and building permits.

Ordinary mandamus is particularly appropriate to compel the issuance of building and use permits since they are generally ministerial in character. (*Ellis v. City Council* (1963) 222 Cal. App. 2d 490, 498, 35 Cal. Rptr. 317; *Sunset View Cemetery Assn. v. Krainz* (1961) 196 Cal. App. 2d 115, 116–124, 16 Cal. Rptr. 317; *McCombs v. Larson* (1959) 176 Cal. App. 2d 105, 106–107, 1 Cal. Rptr. 140; *Palmer v. Fox* (1953) 118 Cal. App. 2d 453, 455–459, 258 P. 2d 30; compare *Agnew v. City of Los Angeles* (1961) 190 Cal. App. 2d 820, 827, 12 Cal. Rptr. 507.)

Palo Alto has adopted section 302 of the Uniform Building Code, which provides that a building permit will be issued if the development plans submitted with the application comply with existing laws. The issuance of the permit is not left to the discretion of the building inspector; it is only when the plans are not up to code that the permit may be denied. Section 1085 applies.

Likewise, Palo Alto Municipal Code section 18.68.040 states that upon payment of a fee "a use permit *shall* be issued without a public hearing if the proposed structure or structures comply with the development plan and conditions thereof." (Emphasis added.) It is apparent that issuance is mandatory once it is determined that the applicant has complied with a previously approved development plan. The fact that the zoning administrator may impose conditions on the permit does not change the essentially ministerial character of the zoning administrator's function.

A. Contract right to permits

Appellant contends that denial of building and use permits

was arbitrary and capricious because the original zoning ordinance adopted in 1964 was tantamount to a contract with appellant permitting him to complete a ten-story building.

However, the contract theory of zoning was expressly disapproved in *Richter v. Board of Supervisors* (1968) 259 Ca. App. 2d 99, 108, 66 Cal. Rptr. 52, where the court stated: "It is settled that zoning regulations are not contracts and may be modified from time to time [citations]. Thus, a county or municipality may amend its zoning ordinance as new and changed conditions warrant and require such revisions [citations]." (See also *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal. 3d 785, 132 Cal. Rptr. 386, 553 P. 2d 546.)

When the city enacted Ordinance No. 2224, it reserved the right to pass on details before construction could begin and to determine that appellant's plans were in compliance with all current codes at the time the permit was to be issued. Appellant assumed the risk that new or amended regulations not contemplated at the time the project began might prevent the construction appellant originally planned.

B. Vested right to permits

In the alternative, appellant urges that denial of the building and use permits was arbitrary in view of its vested rights to construct the ten-story building. Appellant contends that it acquired vested rights on any of the following grounds: (1) by over-building Phase 1 to accommodate Phase 2, (2) by making substantial expenditures in good faith reliance on the 1970 building permit, and/or (3) by making good faith expenditures in the absence of a building permit.

The California Supreme Court has stated the vested rights rule as follows: "It has long been the rule in this state and in other jurisdictions that if a property owner has performed sub-

stantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. (*Dobbins v. City of Los Angeles* (1904) 195 U.S. 223 [25 S. Ct. 18, 49 L. Ed. 169]; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal. App. 2d 776, 784 [194 P. 2d 148].)" (*Avco Community Developers, Inc. v. South Coast Regional Com., supra*, 17 Cal. 3d at p. 791, 132 Cal. Rptr. 386, 553 P. 2d 546.) However, "neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued." (*Avco*, at p. 793, 132 Cal. Rptr. 386, 553 P. 2d 546.)

The vested rights doctrine was founded upon an estoppel theory. "Where a building permit to erect a specific type of building is issued by a county or city and the permittee acts upon it and incurs obligations, or in good faith commences construction, his rights become vested and the governmental body is thereafter estopped to set up a zoning ordinance subsequently enacted. [Citation.] Where no such permit has been issued it is difficult to conceive of any basis for such estoppel." (*Anderson v. City Council* (1964) 229 Cal. App. 2d 79, 89, 40 Cal. Rptr. 41.)

Here appellant maintains that in constructing Phase 1 it expended in excess of $450,000 to accommodate Phase 2. The foundation and structural steel used in Phase 1 are adequate to support all ten stories. The plans and specifications also included many features which would only be required for a completed ten-story building, such as two additional elevator shafts and a machine room in the basement to accommodate additional elevator machinery. By virture of these expenditures, which were made in good faith reliance on valid building and

use permits, it acquired vested rights to construct the ten-story building.

We do not question the appellant's good faith in making these expenditures nor do they appear insubstantial, but we cannot accept that the Phase 1 permits and the expenditures made in reliance thereon conferred an unalterable right to complete Phase 2. The Phase 1 permits were expressly limited to construction of the first four stories and basement. Upon completion of that portion of the building the permits were marked "completed."

Once the appellant here had made substantial expenditures in reliance on the Phase 1 permits, it acquired a vested right to complete the four-story building "in accordance with the terms of the permit" (*Avco*, 17 Cal. 3d. at p. 791, 132 Cal. Rptr. 386, 553 P. 2d 546), but no such right ripened as to Phase 2 for which no permits or other final approvals were obtained. Appellant essentially assumed the risk that the building might not be completed as planned since it was never exempted from the requirement of further permits and approvals before the six-story addition could be constructed, or from complying with all subsequently enacted codes.

Appellant next contends that it obtained vested rights to complete the ten-story building under the Phase 2 building and use permits issued in 1970, which permits ultimately expired. In reliance thereon, appellant states it expended over $500,000 on preparation of the plans and specifications and the purchase of structural steel and elevators for construction of Phase 2. This figure was in addition to the $450,000 it had already spent on Phase 1 in order to accommodate Phase 2.

Respondents contest appellant's characterization of its expenditures, claiming that most of appellant's Phase 2 debts were incurred before the building permit was issued in February 1970.

The trial court found that the Phase 2 construction debts were incurrred some 18 months before the first building permit for Phase 2 was issued. In reviewing the record it appears that appellant's then managing partner ordered complete architectural drawings early in 1968, and they were completed by fall. The steel and elevators were ordered in late 1969. Appellant was thus contractually bound even before it applied for the building permit on December 1, 1969. Notwithstanding that some of the steel and elevators may have been fabricated after February 16, 1970, appellant did not rely on an existing permit when it obligated itself for the fabrication. Appellant's expenditures were not made in reliance on an existing permit but rather in anticipation of one.

Appellant attempts to avoid the conclusion that no vested rights accrued under its 1970 permits by arguing that if the city had acted promptly the building permit should have issued considerably sooner and most of the expenditures would have been made *following* the issuance of the permit. Appellant cites *California Central Coast etc. Conservation Com. v. McKeon Construction* (1974) 38 Cal. App. 3d 154, 112 Cal. Rptr. 903, in support of its position. There the court in dictum stated that vested rights would have accrued if the building permit had not been arbitrarily withheld for almost eight months after an application had been made.

Here the delay which prevented appellant from acquiring a permit earlier than it did was the smoke-proof tower controversy which arose on December 22, 1969, when the city fire marshal determined that certain building code requirements had not been met. The city had previously, in 1965, resolved a similar dispute in appellant's favor within three weeks time by permitting construction of Phase 1 with an interior smoke-proof tower. The 1969 controversy lasted approximately six weeks and was also resolved in appellant's favor.

Unlike *McKeon*, the short delay here was not arbitrary and there was no pretext to prevent appellant from obtaining its building permit. There are no grounds for holding that a building permit "should have been" issued earlier, thus allowing vested rights to accrue. Furthermore,the 1970 permits expired without appellant's having built in accordance with their terms. Appellant cannot six years later assert that it continues to have a vested right to the expired permit.

III. CONSPIRACY TO DELAY BUILDING

Appellant next urges a "conspiracy" among the officials and staff of Palo Alto arose in 1972 to delay and thwart completion of its project. Therefore, such actions estop the city from denying appellant the use and building permits and the extension of time to complete its building.

It is well settled that discriminatory conduct by land use agencies may engender an estoppel independently of a developer's acqusition of a vested right. (See *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal. 3d 110, 124–125, 109 Cal. Rptr. 799, 514 P. 2d 111; *Raley v. California Tahoe Regional Planning Agency* (1977) 68 Cal. App. 3d 965, 978–982, 137 Cal. Rptr. 699; *Morgan v. County of San Diego* (1971) 19 Cal. App. 3d 636, 641, 97 Cal. Rptr. 180; *G & D Holland Construction Co. v. City of Marysville* (1970) 12 Cal. App. 3d 989, 994–995, 91 Cal. Rptr. 227; *Russian Hill Improvement Assn. v. Board of Permit Appeals* (1967) 66 Cal. 2d 34, 37, fn. 5, 56 Cal. Rptr. 672, 423 P. 2d 824.)

Appellant cites various evidence which he contends supports his theory that there was conspiracy among the employees of respondent city to thwart completion of the project. The evidence was conflicting as to why various acts took place and appellant contends this supports his theory of conspiracy. The city employees denied any efforts made for the purpose of

delaying, frustrating or otherwise thwarting the project. The trial court did not find a conspiracy from the conflicting testimony, and there is substantial evidence to support that finding.

Appellant's final argument sounds in inverse condemnation. While both the Federal and State Constitutions provide that private property may not be taken or damaged for public use without payment of just compensation to its owner (Cal. Const., art. I, §19, U.S. Const., 5th Amend.), a "mere diminution" in property value due to a zoning action is not compensable. (*Agins v. City of Tiburon* (1979) 24 Cal. 3d 266, 273-274, 157 Cal. Rptr. 372, affd. 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980).)

Judgment is affirmed.

WHITE, P. J., and DEAL, J., concur.

Court of Appeal of the State of California

IN AND FOR THE

First Appellate District

Division THREE

Court House Plaza Co., etc.,
Plaintiff and Appellant,

vs

City of Palo Alto, et al.,
Defendants and Respondents.

No. 45375

Superior Court No. _____

BY THE COURT:

The petition for rehearing is denied.

Dated _____

_____ P.J.

APPENDIX G

Article in "IN BRIEF" official Bulletin of the Santa Clara County Bar Association vol. 18 no. 2, entitled "Take My Property Please: The Inverse Condemnation Remedy" by Jeffrey P. Widman.

Take My Property, Please: The Inverse Condemnation Remedy

By Jeffrey P. Widman ©*1981*

INTRODUCTION

On March 24, 1981, the United States Supreme Court announced its decision *San Diego Gas & Electric Co. v. City of San Diego*,[1] the appeal which was supposed to have spelled out the fate of California's innovations in the law of inverse condemnation. *San Diego Gas*, however, literally decided nothing about California law, at least not in the plurality opinion of Justice Blackmun. All the action took place in the dissent. There Justice Brennan stole center stage with a fervent reaffirmation of the inverse condemnation remedy—money for a taking of land. Because the four dissenters, by adding Justice Rehnquist's sympathetic concurring vote, may become the future majority, the *San Diego Gas* case may herald the future resurgence of inverse condemnation under the banner of supreme federal law.

I. The Federal Background.

During the fifty or so years following *Pennsylvania Coal Company v. Mahon*[2] and *Euclid v. Ambler Realty Co.*,[3] almost nothing of earthshaking magnitude occurred in the law of inverse condemnation. But then in 1978 the Supreme Court began to show renewed interest in re-thinking the test for a taking of property through police-power regulation. The majority opinion in *Penn Central Transportation Company v. City of New York* (written, significantly, by Justice Brennan) spawned a new catch-phrase possessing yet unexplored meaning—interference with a landowner's "distinct investment-backed expectations."[4] That phrase apparently was intended to lend a measure of financial practicality to Justice Holmes' fine-sounding aphorism that "if regulation goes too far it will be recognized as a taking."[5] But *Penn Central* did not abandon *Pennsylvania Coal:* Justice Brennan simply multiplied the expressions of the essentially economic test for a taking.

After *Penn Central* the Supreme Court continued to accept inverse condemnation cases for review. Its decision in *Kaiser Aetna v. United States*[6] can be viewed as an illustration of what constitutes an interference with a landowner's "distinct investment-backed expectations." The regulation challenged in *Kaiser Aetna* created a federal navigational easement through a private lagoon which the landowner had developed for the use of residents in its project along the shore. In effect, the federal government had transformed the lagoon into an aquatic playground for the enjoyment of all citizens. The Court, speaking through Justice Rehnquist, had no difficulty recognizing a palpable taking under those facts: The government had taken the owner's "right to exclude" the public. Because *Kaiser-Aetna* could be classified as a case of physical invasion by government through a regulation serving merely as a Trojan horse, the decision contributed little to the reformulation of the test for a regulatory taking.

At any rate, Justice Rehnquist himself had no trouble distinguishing *Kaiser-Aetna* in his opinion in *Pruneyard Shopping Center v. Robbins*[7] "Physical invasion" by the public does not signal a taking in every case, Justice Rehnquist reminded us.[8] It is only when depriving the landowner of his "right to exclude" the public impairs the commercial use of the property that the courts will call a constitutional foul. Does the test of a taking, therefore, depend mainly upon the landowner's business program; that is, whether he plans to invite the public onto his land indiscriminately or selectively or not at all? If so, what about the regulation that prohibits the landowner from doing any commercial business whatsoever?

Though esoteric, *Andrus v. Allard*[9] did address the validity of a regulation prohibiting commercial use. In *Allard*, the federal government restricted commercial sales of Indian artifacts composed of bird feathers from species protected by two federal statutes. Observing that the owners retained the artifacts, and could of course continue "to possess and transport their property, and to donate or devise the protected birds",[10] the Court explained that the regulation did not effect any taking of property by prohibiting sales of the artifacts—obviously their most profitable use. The opinion in *Allard*, written by Justice Brennan, exhumed the medieval figure-of-speech portraying the "bundle" of rights held by an owner: Government's removing one "strand" (or was it "stick"?) from the "bundle" does not constitute a taking, Justice Brennan explained, so long as the owner has some left.[11] The Court did not say how many must be left to prevent a taking. Figurative expression has a way of making logic seem unnecessary or, at least, presumptively present.

The Supreme Court clearly had only begun work on the reformulation of the test for a taking. Justice Rehnquist, for one, remained skeptical. After dissenting in *Penn Central* on the ground that government must, short and simple, pay for what-

ever it in fact takes, including diminished property value, no matter what the value of the property remaining,[12] he chided in *Kaiser-Aetna* that "the life of the law has not been logic, it has been experience."[13] Unfortunately for the Court and its Justices during the past half century, the "experience" has proven eclectic. The Court's decisions remain, for that reason, unsatisfying to those who at least hunger for logic in their lives.

II. The California Experiment.

Meanwhile, back in the warmer climate of California, our own Supreme Court began to generate some modern thoughts on not only the test for a taking, but also the appropriate remedy under the Fifth Amendment. First, in *Selby v. County of San Buenaventura*,[14] the California Supreme Court gave its blessing to long-range land-use planning mandated by statute. Because a general plan covers a span of at least a decade, and remains subject to modification, the court held in *Selby* that a general plan has no immediate impact upon the use of the land and therefore cannot effect a taking by regulation in any sense.[15] But that reasoning left unanswered the question whether a zoning or rezoning, which obviously does have an immediate impact upon land use, could effect a taking.

Responding in *HFH, Ltd. v. Superior Court*,[16] the court held that the rezoning of land from commercial to single-family residential did not result in a taking of property, because the landowner had admittedly substantial value left ($75,000 out of $400,000 potential sales proceeds). Moreover, the court reasoned, the landowner retained a use for his land, albeit not the one which would yield the greatest profit.[17] By rejecting a taking claim predicated upon the loss of the highest potential value of the land, the California court rescued cities from a subtle form of intimidation inherent in the inverse condemnation remedy: Give me my project or buy my land for its development value.

Footnote No. 16 in the *HFH* opinion soon became better known than the opinion itself. There the Supreme Court commented: "This case does not present, and we therefore do not decide, the question of entitlement to compensation in the event a zoning regulation forbade substantially *all* use of the land in question. We leave the question for another day."[18] Treating deprivation of "substantially all use" as the touchstone for liability did not surprise anyone greatly. After all, that tentative formulation of the test more or less corresponded to what in practice the United States Supreme Court had done many times, both before and after *Pennsylvania Coal*, in sustaining regulations enacted for a legitimate purpose. Indeed, *HFH* bore great resemblance to *Euclid v. Ambler Realty Co.* factually, although the latter involved a suit for declaratory relief not damages. The shock in footnote 16 came from the questioning of the monetary remedy itself.

Finally, the footnote became the law. On March 14, 1979, the California Supreme Court, in *Agins v. City of Tiburon*[19] confirmed that a zoning ordinance would not result in a taking unless it deprived the landowner of substantially all use. But for a historic climax, the court announced that, when a taking did occur, the landowner would not receive monetary damages. Without exaggeration, one can say that the *Agins* decision left California cities virtual masters of their own destiny in the field of land-use regulation. 'Doing it over again right' is a far more comfortable expiation for violating the Constitution.

Recounting a chronicle of acts by Tiburon betraying its imputed acquisitory intent, the Agins alleged that the rezoning of their land from residential to an open-space zone had rendered economically infeasible any residential development they might undertake. This attack, however, ran squarely into two obdurate facts: First, the new open-space zoning, which requiring preservation of some areas in their natural state, did not pre-

clude all residential use. Indeed, depending upon topography and project design, the landowner might still have received approval for at least one house, and perhaps as many as five houses, on his five acres. Second, the landowner had never sought that approval. Hence the City had never applied the new zoning to the land. Naturally, the City charged the landowner with a "failure to exhaust administrative remedies."

In affirming the trial court's sustaining of the city's demurrer, the California Supreme Court put it another way: The landowner had challenged the constitutionality of the ordinance *on its face* only; and, because the open-space zoning by its express terms allowed *some* use of the land, the landowner *ipso facto* retained some remaining value and so stated no claim for a taking.[20] Nor did the California court see any need for a trial on the taking issue. Although the court did not say it precisely in these terms, no landowner should be permitted to address arguments on economic unfeasibility to a court if he has not first tired to argue the city itself into giving him a practical use of his land.

As the *coup de grace*, the California Supreme Court cut away the traditional remedy for a taking—hard cash. Some plaintiffs' attorneys would have liked to regard the court's discussion of available remedies as *mere dicta*. After all, the trial court had never conducted a trial, much less awarded damages; there was no money judgment to reverse. But the court's announcement in *Agins* that henceforth only mandamus or a suit for declaratory relief remained as remedies for a regulatory taking definitely possessed the tone of a marching order to the California judiciary.

III. Two Close Encounters In Washington

A. *Agins*, Federal Style

Certainly the United States Supreme Court must have be-

lieved the California court had meant what it said. The Supreme Court accepted the landowner's appeal in *Agins*.[21] The Court did so, it was generally believed, because the *Agins* opinion squarely raised the issue of remedy for a taking. Already familiar with the New York's experimentation with a preferred invalidation remedy,[22] perhaps the Court saw an opportunity to resolve the conflict between Fifth Amendment rights and the peceived fiscal troubles of cities, New York and California cities included, during the 1970's.

The briefs submitted to the Court devoted their most creative arguments and strongest language to the remedy issue. Agins and their *amici* deprecated the invalidation remedy as (1) unconstitutional; (2) ineffective, supposedly because it gives a city a second chance to redo the same wrong another way; (3) time-consuming or, under the professional's rule that time is money, too costly; and (4) an abdication of judicial responsibility by the California courts. For their part, Tiburon and its *amici* responded, consonant with the new policy expressed by the California court, that invalidation (a) eliminates the offending regulation and so removes the occasion for "just compensation" under the Fifth Amendment; (b) leaves control of the public treasury in the hands of local legislators (not judges); (c) encourages imaginative land-use planning by removing the risk of unintended takings; and (d) comports with the way the world spins in a modern age of environmental and fiscal crisis. Surely these arguments on remedy offered the Court enough prime meat to feast nine constitutional appetites.

To the surprise of most and the disappointment of some (on appellant's side), the Supreme Court rejected the offering. The Court affirmed the decision below, without reaching the question of remedy.[23] Indeed, the Court essentially agreed with the California Supreme Court that the landowner's attack on the ordinance failed, as a matter of law, because the ordinance was

valid *on its face* as a legitimate exercise of the police power preserving an apparent residential use. Nothing in the record excused the landowner from applying for (and proving he could not obtain) that beneficial use.

The Court, however, did phrase the test of taking somewhat differently from the California Court: The opinion suggested, but did not technically hold, that an ordinance would effect a taking if it "denies an owner economically viable use of his land."[24] This phrase had also appeared in the *Penn Central* opinion.[25] Its recurrence signalled the Court's major concern, on the liability issue, with the economic effect of regulation on remaining *use* as opposed to the remaining *holding value* of the land. After all, could anyone find, during the inflationary 1970's, a parcel of real estate having no holding value whatsoever, even in its original (God-forsaken) condition? The Court could not let real-estate speculation repeal, in practice, the law of takings.

Clearly the Court would welcome a case bearing both issues ripe for a judicial bite—the monetary remedy and the proven economic infeasibility of land use under the challenged regulation.

B. San Diego Gas & Electric: Time-Bomb or Dud?

The Court had but a few weeks to wait. On June 16, 1980, exactly six days after the *Agins* decision, the Court accepted the appeal in *San Diego Gas & Electric Co. v. City of San Diego.* The Court did so not by noting "probable jurisdiction," but rather by postponing "further consideration of the question of jurisdiction" to "the hearing of the case on the merits."[26]

The case, we now learn, is dismissed for lack of federal jurisdiction. Had the Court again missed the problem of finality, overlooking the fact that the Court of Appeal's decision under challenge had remanded the case to the trial court and author-

ized a trial (if the landowner elected) on declaratory relief and mandamus? Or was the Court still troubled by a factual resemblance to *Agins*? For, while the trial court had specifically found that any application for development would have been in vain, the Company really had never approached San Diego with a proposed project under the City's open-space plan.

These questions come naturally to any reader of the plurality opinion. To be generous, one must concede that the judicial history of *San Diego Gas* was confusing enough to bedazzle eyes searching for the remedy issue. While the regulatory details remain meaningful to only those well-versed in California's zoning and general-planning laws, the case in its broadest terms did present the imposition of open-space regulations on low-lying wetlands formerly designated for industrial development. Moreover, the city had clearly tried to raise funds, through a defeated bond issue, to acquire the land for a public park. Most importantly, the landowner had won a trial on the merits and had been awarded damages for inverse condemnation on October 8, 1976. Perhaps, then, the lack of any development application would not prove fatal as it had in *Agins*. Was not the Company really aggrieved by the California Supreme Court's having taken away its monetary damages while the case remained on appeal? And was not that 'taking' more than a mere procedural change—actually a change in substantive constitutional rights?

In terms of chronology, the *San Diego* case was (1) affirmed by the Fourth District Court of Appeal on June 13, 1978; (2) accepted for hearing by the California Supreme Court on July 13, 1978; (3) remanded to Fourth District by the Supreme Court for further consideration "in light of our decision in" *Agins* on July 14, 1979; and (4) remanded by the Fourth District to the trial court on June 26, 1979 in an unpublished opinion. Thankfully, that opinion spoke ambiguously to the nine justices still searching for a takings touchstone. Under the opinion by

the Court of Appeal, would or could the trial court make further factual findings relevant to the taking issue in trying the declaratory relief or mandamus claims?

Yes, the majority of the Court persuaded themselves. Surely, the Court of Appeal would want the trial court to reconsider, "in light of *Agins*' of course, its finding of fact that any development application to the City would have proven futile.[27] This answer, I think, is wrong. The trial judge in 1976 had found all facts necessary to conclude that the application was futile, and the property taken. Conceivably, on remand the trial judge might find other facts peculiarly pertinent to the remedies available in the suits for declaratory relief and mandamus. But this is all. Nothing new had occurred to alter the findings of fact already made. Exploiting all available vagueness, the Supreme Court's reading of the Court of Appeal's opinion gives the impression of a pretext for avoiding a full-blown Fifth Amendment decision.

The minority—Justices Brennan, Marshall, Powell and Stewart—were ready to launch their thesis on inverse condemnation. Justice Brennan's statements on the Fifth Amendment received the approval of Justice Rehnquist in his concurring opinion, although he sided with the majority on the decisive 'final judgment' issue.[28] The future majority of five in favor of a monetary remedy is now identified. If one adds Justice Blackmun's aside, in the plurality opinion, that "the federal constitutional aspects" of the "monetary remedy" issue "are not to be cast aside lightly," one can raise the count from five to perhaps a unanimous nine.[29]

IV. The Future Seen Through the Dissenters' Glass

Among the nine justices differences remain, I suspect, on the definition of the test for a taking. Differences may remain also on the *measure* of monetary damages; for example, whether the landowner should be compensated for the lost development

potential of his land, or only for his direct investment in that development, or only for lost time preceding the invalidation of the regulation. Justice Brennan's dissenting opinion suggests, at least, a probable answer to this latter issue.

First, some monetary remedy for landowners proving the invalidity of a regulation as applied to their land. At minimum the measure of damages will conform to Justice Brennan's proposed standard in the minority opinion:

> In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[30]

This standard for partial temporal takings leaves open many questions. Giving the landowner the rental value of an existing structure for the interim period is an easy solution. But what if the offending regulation prevented replacement or expansion of the building with a more lucrative improvement? Or what if the regulation delayed development of raw, idle land? Even Justice Brennan was not confident that existing authority on partial takings offers complete answers to such questions. He acknowledged that "additional rules may need to be developed."[31] He also invited the states to implement his proposed rule, "provided that their chosen procedures and remedies comport with the fundamental constitutional command." *Id.*

Second, some of the justices, led by Justice Rehnquist, may continue to press for a monetary remedy compensating the landowner for lost development potential (diminution from higher-use value) actually caused by an invalid regulation. This approach would logically allow the government to continue the regulation in effect by paying for a permanent taking of the lost value. But Justice Rehnquist's approach might also give the

government no choice but to pay. I cannot yet identify a majority of five for this approach.

Third, a possible retreat from the twin perils of earlier Fifth Amendment jurisprudence—repeal the regulation or buy the fee (at fair market value). Certainly Justice Brennan wanted to give government a choice—formally condemn the land, keep the regulation while paying just compensation, or repeal the regulation while paying interim damages—*after* an adverse judgment.[32] He carefully avoided the harshest form of inverse condemnation—a judgment at once declaring the regulation unconstitutional and making government the (surprised) owner of the fee, liable for "just compensation." Justice Brennan's description of the Fifth Amendment as "self-executing" need not be read too literally.[33]

Fourth, a continued assimilation of the law on "takings" into federal tort law, as represented by recent Supreme Court decisions under the Civil Rights Act (42 U.S.C. §§1983, 1985).[34] This is really a large and separate topic. It is best left, in the familiar words of the Court, "for another day"—better, for the next decade.

CONCLUSION

The minority opinion in *San Diego Gas* declares that "just compensation" for a taking of property means money, not an intangible social benefit and also not an alternative remedy consistent with some 'just' social policy perceived by the judiciary. The minority opinion also revives the concept that a taking is a kind of 'wrong,' not because it represents a denial of due process, but rather because it is automatically compensable. Erasing the injury will not serve. Government must also repair the harm done when it enacted the regulation. Some money must go to the landowner. By contrast, the California Supreme

Court in *HFH* and *Agins* carefully divorced its redefined concept of "inverse condemnation" from any concept of "wrong." What, now, California?

It is unlikely that California can resist the impending reaffirmation of a monetary remedy by the federal courts. But it is equally unlikely that we will soon read a recantation by the California Supreme Court. The Legislature may notice Justice Brennan's invitation: Create a means of compensating the landowner for his losses while saddled with an invalid regulation and then, perhaps, the United States Supreme Court will not need to decide the next son of *Agins*. Invitations such as that are a glove on an iron fist.

1. U.S. Docket No. 79-678.
2. 260 U.S. 393 (1922).
3. 272 U.S. 365 (1926).
4. 438 U.S. 104, 124, (1978).
5. 260 U.S. 393, 415.
6. U.S. 100 S. Ct. 383 (1979).
7. U.S. 100 S. Ct. 2035 (1980).
8. U.S. 100 S. Ct. 2035, 2041-42.
9. U.S. 100 S. Ct. 318 (1979).
10. U.S. 100 S. Ct. 318, 327.
11. *Id.* According to Justice Rehnquist in *Pruneyard*, 100 S.Ct. 2035, 2041, the correct metaphor is "stick." Justice Rehnquist has the stronger claim to historical accuracy. Does Justice Brennan's choice of "strands" betray some modern attenuation of the landowner's rights?
12. 438 U.S. 104, 139.
13. U.S. 100 S. Ct. 383, 391.
14. 10. Cal.3d 100 (1973).
15. 10 Cal.3d 110, 127-28.
16. 15 Cal.3d 508 (1975).
17. 15 Cal.3d 508, 523.

18. 15 Cal.3d 508, 518, n.16.

19. 24 Cal.3d 266.

20. 24 Cal.3d 266, 277.

21. U.S. 100 S. Ct. 658 (Jan. 7, 1980).

22. From the Court's review of the New York Court of Appleal's decision in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) and perhaps also from the Court's denial of review *Fred F. French Investing Co. v. City of New York*, 39 N.Y. 2d 587, 385 N.Y.S. 2d 5, *cert. denied and appeal dism'd*, 429 U.S. 990 (1976).

23. U.S. 100 S. Ct. 2138, 2143 (1980).

24. U.S. 100 S. Ct. 2138, 2141.

25. The Court quoted the phrase used by counsel for New York City at oral argument, 438 U.S. 104, 139 n.36. The Court itself employed, among other quasi-economic expressions, "reasonable beneficial use." *Id.*

26. U.S. 100 S. Ct. 3008 (1980).

27. Slip Op'n (Blackmun, J.), p.10.

28. Slip Op'n (Rehnquist, J.), p.1.

29. Slip Op'n (Blackmun, J.), p.11.

30. Slip Op'n (Brennan, J.), p.18.

31. Slip Op'n (Brennan, J.), p.24.

32. Slip Op'n (Brennan, J.), p.22.

33. Slip Op'n (Brennan, J.), p.18.

34. *E.g. Owen v. City of Independence*, U.S. 100 S. Ct. 1398 (1980) (city liable for damages and without "good-faith" defense in suit by former police chief for his termination without due process of law.)

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
OCT 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-404

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

COURT HOUSE PLAZA COMPANY,
Appellant,

vs.

CITY OF PALO ALTO, ET AL.,
Appellees.

On Appeal From the Supreme Court of California

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Does either the Takings clause of the Fifth Amendment, or the Due Process or Equal Protection clauses of the Fourteenth Amendment of the Federal Constitution entitle Appellant to equitable relief in mandamus to compel the City to grant required discretionary approvals to build additional stories to Appellant's existing 4-story building because of alleged vested rights to the addition?

2. Is Appellant entitled to raise in this Court the issue whether damages are an appropriate remedy for a taking where that issue was not timely or properly raised by Appellant or expressly passed on below?

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I	
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OCTOBER TERM, 1981

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Appellees.

On Appeal From the Supreme Court of California

MOTION TO DISMISS

Appellees, City of Palo Alto et al., respectfully move to dismiss this appeal on the ground that it does not present a substantial federal takings question, and on the further ground that the federal damages question sought to be reviewed was not timely or properly raised and was not expressly passed on. Rule 16.1(b).[1]

---

[1]Appellant erroneously designates the appeal as being from the Supreme Court of California. The latter Court merely denied a hearing in that court (JSA p. C1) following unanimous affirmance by the Court of Appeal's written decision. Cal. Rules of Court, Rule 28(e); see also Rules 24(a), 25(a). Appellant must be aware that its appeal is taken from judgment of the Court of Appeal since its Notice of Appeal was filed in that court. JSA p. D1.

To avoid confusion in this Court's records, Appellant's erroneous designation has been used in the title page of this motion.

STATEMENT OF FACTS

A. THE REMEDY OF DAMAGES WAS NOT SOUGHT OR LITIGATED IN THIS CASE

To fairly understand this appeal, it is essential to emphasize at the outset that Appellant never sought damages in its petition nor did it litigate the question of its right to such damages. To the contrary, the petition sought only equitable relief in mandamus for alleged abuse of discretion by Appellees ("City"). CT 59-61.[2] The federal question of "constitutionally mandated remedy of just compensation" (JS p. i) and "money damages for inverse condemnation" (JS p. ii) allegedly presented by this appeal were not timely nor properly raised nor expressly passed on. Thus, the appeal should be dismissed on that ground alone as well as for want of a substantial federal question.

The fact that a damages remedy was not sought or litigated in this case is also graphically demonstrated by a "Complaint For Damages" filed by Appellant against City after the instant mandamus proceeding was filed. The Court is respectfully requested to take judicial notice of that Complaint pursuant to Federal Rules of Evidence, Rule 201(f) and 201(b). A copy is attached hereto as Appendix 1. That Complaint alleges essentially the same facts as the instant petition (CT 1-59) and it seeks general and special damages. Appendix 1, p. 10:18-20. Clearly, Appelland considered that Complaint, not the instant petition, as his quest for damages.

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[2]The following abbreviations are used herein: "JS"—Jurisdictional Statement, with appropriate page numbers following; "JSA"—Appendix to Jurisdictional Statement: "JSA Supp."—Supplement to Appendix to Jurisdictional Statement; "CT"—Clerk's Transcript in the California Court of Appeal; "FF"—Trial Court Finding of Fact; "CL"—Trial Court Conclusion of Law.

Moreover, since the California courts did not find any taking in this case, the issue of remedies available for a taking was not considered. *Agins v. City of Tiburon*, 447 U.S. 255, 263, 100 S. Ct. 2138, 2143 (1979) affirming 24 Cal. 3d 266, 157 Cal. Rptr. 372.

This case involves an appeal from a final judgment of the California Court of Appeal which unanimously affirmed the trial court's judgment denying Appellant's petition for a writ of *mandamus*.

As noted above, Appellant's petition sought *exclusively* to have the trial court exercise its equitable powers to direct City to issue permits and a time extension to add six stories to an existing, fully functioning four-story office building. The trial court denied all relief and entered judgment in favor of City following some 22 days of trial. JS p. 9. All issues, both factual and legal, were fully litigated by both sides (JSA p. A-19), and fully considered by the trial court in a comprehensive Memo of Decision (JSA pp. A1-A18) and extensive Findings of Fact and Conclusions of Law (JSA pp. A19-A34).[3] The California Court of Appeal affirmed the trial court's judgment for City. 117 Cal. App. 3d 871, 173 Cal. Rptr. 161; JSA Supp. pp. B1-B15.

B. APPELLANT WAS AWARE OF THE CONDITIONS PRECEDENT TO BUILDING PERMIT APPROVAL AND USE OF ITS PROPERTY CONTAINED IN INITIAL ZONING ORDINANCE NO. 2224

The Court of Appeal opinion succinctly and accurately states the complicated factual chronology of this case as found by the trial court. That chronology spans some 12

[3]Each side presented 7 witnesses at trial. Appellant offered 261 exhibits and the court admitted 253; Appellees offered 61 exhibits and 55 were admitted. Each side filed pre-trial and post-trial briefs. The 10-volume trial transcript contained 2,683 pages.

years beginning with the adoption of City Ordinance No. 2224 on December 28, 1964, establishing a planned community ("PC") zoning district and development plan and schedule for Appellant's property. PSA Supp. pp. B2-B4. This Court's attention is respectfully invited to a review of the Court of Appeal chronology and the Trial Court's detailed Findings. JSA pp. A20-A34. Such a review vividly demonstrates that Appellant's Jurisdictional Statement contains significant factual errors when compared with the findings and record. Such a review also highlights that Appellant has failed to cite appropriate references to the record in its Statement of the Case, and that its Statement is frequently at odds with the Trial Court's Findings. JS pp. 3-9. Thus, even giving Appellant the benefit of the doubt, it merely reargues factual issues fully litigated in the trial and appellate courts of California and found adversely to it, in hopes that this Court will reweigh the evidence and make different findings. Such has never been this Court's function. *Fry Roofing Company v. Wood* (1953) 344 U.S. 157, 160.

Ordinance No. 2224 established a specially-enacted PC zoning for the property. Although special to a particular piece of property, such PC zoning is common in California. Its merit as a flexible planning tool that simultaneously serves both the public and the developers' interest has been recognized as meritorious by the California Supreme Court. *AVCO Com. Dev. Inc. v. South Coast Reg. Com'n.*, 17 Cal. 3d 785, 796, 132 Cal. Rptr. 386, 393 (1976), *Cert. Den.* 429 U.S. 1083.

The Ordinance unequivocally imposes a number of conditions precedent to use of the property. JSA pp. E1-E5. First, it prescribes a fixed, limited period for start of construction of both Phase 1 and 2. JSA p. E1-E2(§ 3(1)(a) and (b)); p. A33, CL 2. Nothing in the Ordinance provides that the completion of Phase 1 guaranteed or vested any

right to complete Phase 2 (JSA p. A33, CL 3); nor that Phase 2 approval was in any way related to future demand. As noted by the Court of Appeal, when the City enacted the Ordinance

> "it reserved the right to pass on details before construction could begin and to determine that appellant's plans were in compliance with all current codes at the time the permit was to be issued. *Appellant assumed the risk that new or amended regulations not contemplated at the time the project began might prevent the construction appellant originally planned.*"[4] (Emphasis added)

JSA Supp. p. B10; see also JSA Supp. p. B12.

Ordinance No. 2224 contains a development plan and development schedule providing for two phases of construction:[5] Phase 1 provided for start of construction of a 4-story office building and a parking garage within 2 years of Council approval; Phase 2 provided for a start of construction of six additional floors of the 4-story office building and additional levels on the parking garage by October 31, 1976, thus allowing nearly 12 years after passage of the Ordinance for start of Phase 2. JSA p. A20, FF 5. Because of the lengthy time periods and periodic building code changes which were incorporated into City's ordi-

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[4]The underlined portion of the quote refers to JSA p. A22, FF 12. That Finding states (a) that Appellant was *privately* advised by its architect, prior to issuance of the Phase 1 building permit, of the risk of non-recovery of the expense of overbuilding Phase 1 to accommodate Phase 2 due to future lack of demand, and (b) that Appellant assumed that risk.

[5]Pursuant to PC zoning district regulations § 18.68.070, 18.68.070 (a) (JSA p. E7) and 18.68.080.A (JSA p. E8), the development schedule of the Ordinance (JSA p. E1, Section 3(1)) is part of the development plan which, in itself, is the PC zoning. JSA p. A32, FF 57.

nances (JS p. A28, FF 40) and which were complied with by Appellant's architect (JS p. A23, FF 16), City imposed the various conditions precedent to use contained in the Ordinance.

A second condition precedent to use of the property was the necessity to obtain a discretionary use permit "for any and all uses". JSA p. E6, PC District Regulations § 18.68.040. The Ordinance specifies such uses. JSA pp. E2-E3, Section 3(2). Other conditions are also enumerated governing structures, site and parking. JSA p. E3.

Appellants were aware of all of these required conditions precedent to building permit issuance and use of the property from the very passage of the Ordinance.

C. APPELLANT COMPLETED, LEASED AND USED THE 4 STORY PHASE 1 OFFICE BUILDING IN 1968 IN ACCORDANCE WITH ORDINANCE NO. 2224

On June 14, 1966, a building permit was issued for construction of the 4 story building. As noted by the Court of Appeal opinion, that permit was "expressly limited to construction of the first 4 stories and basement". JSA Supp. p. B12; JSA p. A22, FF 11. That building was completed in August, 1967, and the building permit was so marked. JSA Supp. pp. B3, B12.[6]

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[6]The trial court found that Appellant "did not commence construction on Phase [2] by virtue of expending money to overbuild Phase 1 to accommodate it". JSA p. A32, FF 61. The trial court also concluded that Appellant "did not acquire vested rights to construct Phase 2 by virtue of overbuilding Phase 1 to accommodate it or in any other respect". JSA p. A34, CL 12. The Court of Appeal noted that "Only the four-story building has been completed". JSA Supp. p. B2.

The Court of Appeal stated that the 4-story building was "fully functioning and substantially leased by the spring of 1968". JSA Supp. p. B3. The trial court had found:

> "It is a self-contained, functional structure even without the additional six floors, and *has been occupied and used up to and including the present.*" (Emphasis added)

JSA p. A22, FF 13. Appendices 2 and 3 hereto are copies of two of the photographs from Appellee's trial exhibit R71 showing Appellant's existing occupied 4-story building in its intended and actual use as of the date of trial.

D. PHASE 2 WAS NEVER BEGUN DUE SOLELY TO APPELLANT'S OWN MISJUDGMENTS AND DELAYS, GENERAL ADVERSE ECONOMIC CONDITIONS AND APPELLANT'S INABILITY TO OBTAIN FINANCING

By letter of September 30, 1969, before even obtaining financing or applying for a building permit, Appellant ordered its general contractor to immediately place all subcontracts for off-site fabrication of items required for the 6-story addition including, inter alia, steel, elevators and exterior facade; and it thereby "fully obligated itself to pay for Phase 2 development costs prior to obtaining financing to construct Phase 2 and prior to being issued a building permit . . . (almost five months later)". JSA, p. A24, FF 20 and 21; JSA Supp. p. B13. As the Court of Appeal stated, notwithstanding such off-site fabrication of some of the steel and elevators after permit issuance, Appellant did not rely on an existing permit when it obligated itself; but rather incurred expenses *"in anticipation of"* a permit. JSA Supp. p. B13. Appellant admitted that the foregoing was a mistake which resulted in its financial difficulties and the firing of the errant general partner. The mistake was not at-

tributable to the City. JSA p. A24, FF 22. Appellant's inability to obtain Phase 2 financing was not due to any act of City. JSA p. A24, FF 23. These facts are omitted from Appellant's Statement of the Case in violation of Rule 15.1(g) which requires "facts material to consideration of the questions presented". JS p. 5.

Continuing its effort to have this Court reweigh the evidence, Appellant misstates the record regarding the "smokeproof tower controversy" in late 1969. Appellant's characterization of that affair is completely inconsistent with the Trial Court's Findings and the Court of Appeal decision. Appellant's statements at JS pp. 5, 14, 16, 18, and 19 regarding that controversy and alleged Phase 2 vested rights are directly refuted by FF 20-25, 37, 59, 60, 62 and 63. Appellant's insistence that the former city attorney ruled that it had vested rights to Phase 2 is neutralized by FF 25 and the Trial Court's Memo of Decision. JSA p. A16. As the Trial Court found, the city attorney's reference to vested rights was not intended to apply to the 6-story addition.

As to the smokeproof tower controversy, the Court of Appeal held that it resulted only in a short delay and was neither arbitrary nor a pretext to prevent Appellant from getting a building permit. JSA Supp. pp. B14-15; JSA p. A27, FF 37; p. A32, FF 59-61; p. A34, CL 15.

Thereafter, City granted extensions of both the use and building permits for Phase 2, but they expired because of Appellant's inability to get financing. JSA pp. A26-A27, FF 31-34.

No construction was ever undertaken on either the six-story addition or the permanent parking structure. JSA p. A27, FF 35; JSA Supp. p. B3. Appellant never acquired vested rights to Phase 2. JSA Supp. p. B14; JSA p. A34; CL 10, 12, 13.

In early 1970, City reminded Appellant of the October 31, 1976, deadline for start of the permanent parking structure and that it should seek a corresponding change of the development plan in light of its statement to the City that it would not build that structure. JSA p. A26, FF 27-30.

In August, 1970, the County of Santa Clara, a separate public entity, completed its condemnation of a small portion of the permanent parking structure site for a long-planned County road project adjacent thereto. County paid Appellant just compensation which included cash, severance damages for diminution in value of the entire property and excess County lands contiguous to that site. JSA p. A27, FF 36.

In mid-1973, Appellant withdrew a Phase 2 use permit application and did not resubmit it because its chief tenant moved to a new building to achieve its own corporate identity. There was no evidence that it vacated because of Appellant's inability to provide more space for it in the contemplated 6-story addition. JSA p. A27, FF 38.

In 1973, a fifty-foot height limit was enacted for all buildings in the City except in PC zoning districts like Appellant's. JSA Supp. p. B3. Contrary to Appellant's misstatement that City adopted an anti-high rise philosophy, the trial court found no evidence of such. JS p. 6; JSA p. A24, FF 22-24; p. A27, FF 32-37; p. A32, FF 59-63; p. A34, CL 15.

In 1974 (as well as 1968 and 1971) City passed ordinances updating its building codes. JSA p. A28, FF 40. These codes (Uniform Building Code § 302) prohibited issuance of building permits for plans that did not comply with existing laws. JSA p. A23, FF 16; JSA Supp. p. B9. As to the design of both Phase 1 and 2, the practice of Petitioner's architect was to apply such changes to Phase

1 and 2 even though they occurred after work had commenced. JSA p. A23, FF 16.

From 1973-1976, Appellant did nothing about Phase 2 despite being told by City in 1975 that it might agree to a reduction of parking spaces. JSA p. A28, FF 41.

E. APPELLANT'S DILATORY AND DEFICIENT EFFORTS IN 1976 TO SEEK AN EXTENSION OF THE PC ORDINANCE DEADLINE TO START PHASE 2

On June 30, 1976, Appellant filed a zone change application to change the PC development plan to resolve the parking problem ensuing from the County's partial take. JSA Supp. p. B3. However, that application was defective —JSA p. A28, FF 42; p. A29, FF 44. Appellant did not request a hearing until August 25, 1976. JSA p. A29, FF 45.

Almost 9 years elapsed from the date Appellant completed the 4 story building on August 17, 1967, to August 11, 1976, when it submitted a request for a 3-year extension of the Phase 2 deadline of October 31, 1976. On August 25, 1976, the City Planning Commission recommended to the Council that the 3-year request be denied. Thereafter, instead of going to the City Council, Appellant withdrew its 3-year request and, instead, filed an application for a use permit on August 30, 1976. On August 31, 1976, Appellant submitted an application for a building permit for the six-story addition, but the submittal was based upon the building plans for which a permit had been issued in 1970. This submittal was against the advice and practice of its own architect. JSA p. A23, FF 16. Since these plans had not been revised to meet current code requirements, the building inspector refused to issue a building permit. JSA pp. 29-30, FF 46-49; JSA Supp. p. B3.

In early September, 1976, City advised Appellant to resubmit revised building plans to conform to current codes;

but Appellant did not do so until October 15, 1976, 16 days before the deadline for the start of construction. City also advised Appellant that it would submit the revised plans to the International Conference of Building Officials for plan check because there were numerous, complex building code changes that required extensive review, and under then existing time constraints City could not undertake the review. JSA p. A30, FF 50. In its Memo of Decision, the Trial Court found that the City's action was motivated by "the necessity to assure" building code compliance and an attempt to "fulfill the obligations imposed by law", and not any intent to obstruct or delay Appellant. JSA p. A17. Thus, again, Appellant's statement of these facts conflicts with the Trial Court Findings. JS p. 10, pp. 20-21 (where Appellant incorrectly states that city officials " 'sat on their hands' and did not issue . . . permits to which [Appellant] was clearly entitled", etc.)

On October 1, 1976, Appellant filed a request to extend the development schedule one year, and on October 28, the Planning Commission recommended denial to the City Council. JSA p. A31, FF 51-53. Also on October 28, 1976, City denied Appellant's request for an interim building permit on the grounds that no use permit had yet been issued for Phase 2 and that no plans for construction of a parking structure had been submitted. JSA p. A31, FF 54.

On December 6, 1976, following a thorough public hearing, the City Council denied Appellant's one-year request. No building permit existed at that time, having previously expired. JSA pp. A9-A10. The numerous factual bases supporting the Council's decision are set forth in Findings 55 and 56. JSA pp. A31-A32; JSA pp. A14-A15. As the Court of Appeal held, the trial court's finding that the denial was reasonable and nondiscriminatory and not violative of due

process or equal protection was supported by substantial evidence. JSA Supp. B6-B8; JSA p. A33, FF 63; p. A34, CL 15.

Thereafter, Appellant filed the instant petition for writ of mandamus seeking only equitable relief.

I

THE PRIMARY ISSUE RAISED AND LITIGATED BELOW WAS WHETHER APPELLANT WAS ENTITLED TO EQUITABLE RELIEF TO COMPEL CITY TO ISSUE REQUIRED DISCRETIONARY APPROVALS TO BUILD ADDITIONAL STORIES TO APPELLANT'S EXISTING 4 STORY BUILDING BECAUSE OF ALLEGED VESTED RIGHTS TO THE ADDITION. WHETHER A SUBSTANTIAL FEDERAL QUESTION WAS RAISED CAN BE DETERMINED BY REFERENCE TO THE TAKINGS JURISPRUDENCE OF THIS COURT, AND THAT JURISPRUDENCE COMPELS THE CONCLUSION THAT APPELLANT NEVER ACQUIRED SUCH VESTED RIGHT AND THAT NO TAKING OCCURRED

A. The Takings Doctrine of This Court Establishes That Appellant Never Acquired Vested Rights and That No Taking Has Occurred Because There Has Been No Interference With Reasonable Investment Backed Expectations

Appellant has tipped the entire record herein on its end in an unjustified and transparent effort to force its case to fit into the takings remedy issue not addressed by this Court in *San Diego Gas & Electric Co. v. City of San Diego* (1981) ..... U.S. ....., 101 S. Ct. 1287, 67 L. Ed. 2d 551. Aside from the fact that Appellant never sought or litigated the right to damages for a taking (Part II, infra)

but instead essentially tried this as an abuse of discretion case, neither *San Diego Gas* nor any of the other decisions of this Court cited (but not analyzed) by Appellant supports its assertion that this record presents a substantial federal question warranting this Court's attention. JS p. 3. To the contrary, the record herein is plain that the challenged land use regulations of City and the judgment of the California courts unanimously upholding them are entirely consistent with the holdings of this Court in cases cited by Appellant and in other cases as well. Those cases establish that Appellant has totally failed to demonstrate the threshold liability under a taking which is absolutely necessary to raise the issue of the appropriate remedy for a taking.

Kaiser Aetna v. United States 444 U.S. 164, 100 S. Ct. 383 (1979) plainly demonstrates the absence of any substantial or novel federal issue in the instant case. Under the takings principles there applied it is clear that there was no taking in the instant case. In *Kaiser Aetna* a privately owned pond, non-navigable in its natural state, became navigable waters after the owner dredged it for construction of a private marina and adjacent condominiums and thereby apparently subjected it to Congress' regulatory authority under the Commerce Clause. The Court held that the imposition of such a navigational servitude would exceed ordinary regulation for navigation and result in actual physical invasion of the privately owned marina; and that if such servitude were imposed after the government had consented unconditionally to the dredging and the substantial costs involved, the government would have taken property rights found to constitute reasonable investment backed expectations. *Id.* at 179-180.

Kaiser examined the taking question by identifying several factors: (1) whether the regulation interfered with "reasonable investment backed expectations", (2) its eco-

nomic impact and (3) the character of the governmental action. Id. at 175. In contrast to the clearly defined and understood regulatory limits and conditions precedent to Appellant's use of its land herein, in *Kaiser* the Army Corps of Engineers did not require any permits from the landowner prior to development, but merely stood by while the owner spent large sums of money for required improvements that were previously made known to the Corps. Id. at 167. It was only thereafter that the Corps asserted a public right of access to the new navigable pond created completely at private expense. The Court noted that the Corps could have imposed appropriate conditions on approval of the dredging. (Such conditions were imposed on approval in the instant case in Ordinance No. 2224.) Although the unconditional consent given by the Corps would not estop the United States, nonetheless *Kaiser* had obtained an "economic advantage" or "reasonable investment backed expectation" which the government's assertion of a navigational servitude would take by physical invasion through overregulation.

In the instant case, Appellant never had a reasonable investment backed expectation for several reasons. First, Ordinance No. 2224 made Appellant aware from the outset that it had a reasonable period of time to start Phase 2 and exactly what conditions it had to meet as a prerequisite to obtaining required building and use permits therefor. It was always on notice as to the obligations it had to fulfill before it could proceed with Phase 2. See Statement of Facts, supra, Part B. Second, as found by the trial court and the Court of Appeal, Appellant assumed the risk of non-recovery of the expense of overbuilding Phase 1 after its own architect advised it, prior to the adoption of Ordinance No. 2224, that lack of future demand may result in the completion of only Phase 1. JSA p. A22, FF 12; JSA Supp. p. B10, B12. Third, as also pointed out by the trial

court and Court of Appeal, the Ordinance established fixed periods for starting both Phase 1 and 2, and Appellant thus, "assumed the risk that new or amended regulations not contemplated at the time the project began might prevent the construction appellant originally planned". JSA Supp. pp. B10, B12. Appellant was not given and could not reasonably have expected that construction of Phase 1 would give it vested rights to Phase 2, particularly if circumstances changed, as City found they had in denying a time extension. See *Mugler v. Kansas* (1887) 123 U.S. 623 at 669:

> "It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors, but the State did not thereby give any assurance or come under any obligation that its legislation upon that subject would remain unchanged." Id. at 669.

This Court also held that property owners have no vested rights in prior zoning because of conditions once obtaining. *Hadachek v. Sebastian* (1915) 239 U.S. 394, 410. *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 387. Fourth, City approved Appellant's request for the reasonable beneficial use of its property in the 4 story existing office building. The City has never denied Appellant such use. Indeed, it has continuously, fully used its office building for its intended purposes and there has been no cutback of such use, nor any physical invasion as in *Kaiser Aetna*, supra. Fifth, again as found by the trial court, Appellant's Phase 2 financial problems were of its own making and not the City's (e.g. ordering steel and elevators before obtaining financing in 1969; loss of chief tenant in 1973; County condemnation). Its inability to meet the Phase 2 deadline was a direct result of its inability to obtain financing and that had nothing to do with the City. JSA p. A24, FF 23.

Kaiser also held that another factor that resulted in a taking therein was that the pond had always been held to be private property under Hawaii law. *Kaiser Aetna v. United States*, supra, 444 U.S. at 179. In effect, Kaiser had an established vested right to continued use of the pond under local law. Similarly, in the instant case, California law holds that a landowner does not acquire any vested rights to proceed with a development unless he first obtains a building permit to construct a specific type of building and thereafter spends a considerable sum of money in reliance on such permit. *AVCO Com. Dev. Inc. v. South Coast Reg. Com.* (1976) 17 Cal. 3d 785, 793, cert. den. 429 U.S. 1083. (Relied on by the Court of Appeal herein. JSA Supp. B10-B11.) *AVCO* is consistent with federal authorities holdings on vested rights. *Mugler v. Kansas*, supra, 123 U.S. at 669; *Hadachek v. Sebastian*, supra, 239 U.S. at 410; *Euclid v. Ambler Realty*, supra, 272 U.S. at 387; *City of Ann Arbor v. Northwest Park Const. Corp.* 280 F. 2d 212, 216 (6th Cir. 1960) ("Zoning is not a contract which forecloses its subsequent amendment. *Reichelderfer v. Quinn* 287 U.S. 315").

A review of other holdings of this Court cited in *Kaiser* likewise compels the conclusion of want of any real federal takings question herein. In *Penn Central Transp. Co. v. New York City* 438 U.S. 104, 98 S. Ct. 2646 (1978), on facts quite similar to this case, this Court rejected the contention made by Appellant herein that land use regulations had "'taken' their right to . . . superadjacent air space, thus entitling them to 'just compensation' . . . ." *Penn Central Transp. Co. v. New York City*, supra at 130, 138. This Court limited its inquiry to the threshold question involved in this case; namely, whether a "taking" has occurred. Id. at 122. The building involved in *Penn Central* was Grand Central Terminal. Although a 20 story office tower was originally designed to be built above the Ter-

minal, it remained unbuilt. Id. at 115. As is true in the instant case, the Terminal was overbuilt to accommodate the planned vertical expansion. Id. at 115, n. 15. This Court held that the application of New York City's Landmark Preservation Law to preclude the owner's request to build the originally planned office space atop the Terminal was substantially related to the promotion of the general welfare, permitted "reasonable beneficial use" of the property *as a whole*, and thus did not result in a taking under the Fifth Amendment. *Id.* at 138.

As in *Kaiser Aetna*, supra, *Penn Central* analyzed the taking question in terms of essentially the same factors: (1) existence of regulatory interference with reasonable investment backed expectations; (2) the character of the governmental action (e.g., taking by physical invasion as against no taking by merely adjusting benefits and burdens of economic life to promote the common good); (3) whether the prohibition of contemplated land uses would promote the health, safety, morals or general welfare, despite destroying or adversely affecting recognized interests (no taking). Id. at 124-125. Noting the particular importance of the third factor to *Penn Central*, the Court cited examples of zoning land use prohibitions similar to those involved in the instant case upheld against taking claims in *Gorieb v. Fox* (1927) 274 U.S. 603, 608 (no compensation for setback requirements) and *Welch v. Swazey* (1909) 214 U.S. 91 (no compensation for prohibiting use of air rights).

Of particular significance both to *Penn Central* and this case was the Court's rejection in *Penn Central* of precisely the same taking contention of Appellant herein, namely,

> "that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development . . . ."

Emphasizing that the law of takings does not divide a parcel into discrete segments and inquire into the regulatory effect on such segments, the Court held that the focus in determining a taking is both "on the character of the action and on the nature and extent of the interference with rights in the parcel *as a whole*". (Emphasis added). Id. at 130.

As demonstrated above in the discussion of *Kaiser Aetna*, Appellant herein cannot show a reasonable, investment backed expectation.

As to the second taking factor identified by *Penn Central*, the "character" of the City's denial of the time extension request herein did not result in any physical invasion or use of Appellant's property. Instead, City was merely adjusting Appellant's benefits and burdens in the use of its whole property with a 4 story office building to promoting the common good articulated by the City in its act of denial. See the numerous factual bases supporting the denial: unresolved parking problem, 10 year length of time for the development, advantage over others in granting the extension, changed conditions of the area, height limitations, changes in City's comprehensive plan, etc. JSA p. A31, FF 55 and 56.

As to the third factor isolated by *Penn Central*, the restriction of use of Appellant's property to the 4 story building resulted, at most, in a mere diminution in value, if that, of the whole property, while promoting the public good as just indicated above. Neither the trial court nor Court of Appeal found that Appellant was burdened more than others.

As *Penn Central* held, the effect of the time extension denial herein is "simply to prohibit appellants or anyone else from occupying portions of the airspace above the [4 story building], while permitting appellants to use the remainder of the property in a gainful fashion." Id. at 135.

Both *Penn Central* and *Kaiser Aetna* cited *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393. An analysis of that case also indicates the lack of any real federal question herein. In a private dispute, the claimant landowner in *Pennsylvania Coal* sold surface rights to his land, expressly reserving the right to remove coal thereunder. Thereafter, a state statute forbade all subsurface mining (which the state said caused houses to subside) except by the superadjacent owner, or 150 feet distant from improved property. The Supreme Court held that the statute was a taking because it destroyed the very rights which the Coal Company had purchased from the surface owners. The Court did not award damages. It merely declared the statute invalid.

In *Pennsylvania Coal*, it was conceded that the company had purchased and owned traditionally recognized vested property rights. Id. at 159, 160. By contrast, in the instant case, the trial court found and the Court of Appeal affirmed that Appellant never acquired vested rights in Phase 2. Indeed, Appellant herein recognizes that its Phase 2 work was "performed in the expectance of obtaining a permit". JS p. 19. The Court of Appeal herein phrased it in almost exactly parallel terms by holding that Appellant incurred its Phase 2 expenses "in anticipation of" a permit. JSA Supp. p. B13. Similarly, in *Pennsylvania Coal*, the court acknowledged that the "greatest weight is given to the judgment of the legislature". Id. at 159. See also *Andrus v. Allard* (1979) 444 U.S. 51, 100 S. Ct. 318, where this Court held that federal legislation prohibiting commercial sale of pre-existing avian artifacts did not result in a Fifth Amendment taking, deferring to Congress' judgment to choose the method it found most efficacious and convenient to achieve the legislative goal even if there were alternatives. In language appropriate to describe the legislative

denial of time extension herein, the Court stated: " 'The legislature . . . . is authorized to pass measures for the protection of the people . . . in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.' ". Id. at 59. The Court emphasized that it was crucial to its finding of no taking that the owners retained certain other rights, as does Appellant herein. Id. at 66.

It is evident from the foregoing review of this Court's Fifth Amendment takings cases that no substantial federal takings question has been raised by Appellant for review under *San Diego Gas & Electric*, supra, 101 S. Ct. 1287, or otherwise.

B. Appellant's Assertion of Vested Rights Is Based on Sister State Cases That Are Either Inapposite or Inconsistent With Federal and California Authorities Establishing That Such Rights Do Not Exist

The major portion of the Jurisdictional Statement is devoted to resting jurisdiction on the "Importance of the Vested Rights Issue" assertedly involved. JS pp. 13-23. Boiled down, this issue is simply a replay of the first asserted ground of jurisdiction. See, e.g., JS p. 23. No federal cases are relied on in support of this asserted ground. Instead, reliance is placed almost totally on inapposite holdings of state courts other than California (JS pp. 13-20); or on unsuccessfully trying to challenge the reliance of the trial and appellate courts herein on the leading California vested rights cases, *AVCO Com. Dev. Inc. v. South Coast Reg. Com.*, supra, 17 Cal. 3d 725. JS pp. 21-22. The result is a total lack of any relevant, let alone persuasive, federal authority.

As earlier noted, *AVCO* is fully consistent with the holdings of this Court that property owners have no vested rights in prior zoning because of conditions once obtain-

ing. *Hadachek v. Sebastian,* supra, 239 U.S. at 410; *Euclid v. Ambler Realty Co.,* supra, 272 U.S. at 387; *Mugler v. Kansas,* supra, 123 U.S. at 669. This Court denied certiorari in *AVCO.* 429 U.S. 1083. (Aside from its not being germane to the real issue of a substantial federal question, Appellant attempts to distinguish *AVCO* on the grounds that it involved interim legislation, i.e. the California Coastal Zone Act. It continues to ignore, as it has all along, that *AVCO* relied on non-Coastal Zone Act common law authority. *AVCO v. South Coast Reg. Com.,* supra, 17 Cal. 3d at 791-792). Appellant also misplaces reliance on *Pardee Construction Co. v. California Coastal Comm.* (1979) 95 Cal. App. 3d 471, 157 Cal. Rptr. 184. JS p. 22. In that case, the parties conceded that there were vested rights; and the only issue was whether they lapsed with expiration of a building permit. Id. at 478, 481-482.

This Court has also long recognized that the exercise of the police power through land use regulation is one of the most essential and least limitable powers of government. *Hadachek v. Sebastian,* supra, at 410.

AVCO is also in accord with decisions of various federal courts of appeal. In *Southpark Square Ltd. v. City of Jackson* (C.A. 5, 1977) 565 F. 2d 338, 343, the Court found no taking for denial of a building permit because the owner's loss of property was "a direct consequence of its own financial arrangements and tactical decisions, not because the City committed any act remotely resembling a taking". The Court said the owner "took the risk that its application for a building permit would be denied in a proper exercise of the police power by the City. . . .". It continued:

> "We cannot consider such a denial as an invasion of any vested property right, for until a permit was issued, Southpark had no vested right to build a Ramada Inn. As relevant to the issue of whether there was a constitutional taking, the operative cause of

> Southpark's loss was the private financial arrangement made by it in acquiring the property. The City's exercise of its licensing power cannot be circumscribed, under an inverse condemnation theory, by private contracts to which it is not a party." (565 F. 2d at 344).

Similarly, in *Donohue Const. Co. v. Montgomery City Council* (C.A. 4 1977) 567 F. 2d 603, 608, the Court held that denial of a building permit for an office building because of lack of adequate sewer facilities was not a taking.

In *City of Ann Arbor v. Northwest Park Const. Corp.*, supra, 280 F. 2d 212, the owner argued it had done such substantial physical work toward the development of its property prior to the challenged rezoning that it had acquired a vested right. The court rejected that contention, stating at p. 216: "Zoning is not a contract which forecloses its subsequent amendment. *Reichelderfer v. Quinn*, 287 U.S. 315 . . ."

In short, controlling federal and California authority compels the conclusion that Appellant never acquired vested rights and that therefore no corresponding substantial federal question is raised.

C. Appellant Has a Reasonable Beneficial Use of Its Property

In *Penn Central Transp. Co. v. New York City*, supra, 438 U.S. 104, the Court held that the application of the City's regulation to preclude construction of a planned office addition atop the Terminal permitted reasonable beneficial use of the property considered as a whole. Id. at 138. The Court refused to divide the property into discrete segments and inquire into the allegedly confiscatory effect on such segments. Id. at 130.

In the instant case, the effect of the denial of the request for time extension beyond the original 12 years allowed

by Ordinance No. 2224 is "simply to prohibit appellants or anyone else from occupying portions of the airspace above the [4 story building], while permitting appellants to use the remainder of the property in a gainful fashion." Id. at 135. It has been amply demonstrated herein that Appellant has continuously had a "reasonable beneficial use" of its property as a whole. JSA p. A22, FF 13.

II

THE ALLEGED FEDERAL QUESTION WHETHER DAMAGES ARE AN APPROPRIATE REMEDY FOR A TAKING WAS NOT TIMELY OR PROPERLY RAISED BY APPELLANT AND WAS NOT EXPRESSLY PASSED ON BELOW

Contrary to Appellant's assertion (JS pp. 11-12), this case does not raise the issue of remedy available for a taking. *Agins v. City of Tiburon* (1979) 24 Cal. 3d 266, 157 Cal. Rptr. 373, *aff'd* 447 U.S. 255, 100 S. Ct. 2138. Rather, *Agins* dramatically highlights the absence of such remedy issue herein.

> "Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation."

Id. at 263.

As previously indicated in the Statement of Facts, supra, Part A, Appellant never sought damages for an alleged taking in its petition for a writ of mandamus, but sought only equitable relief. This Court has refused to consider constitutional challenges not properly raised in a petition. *Ellis v. Dixon* (1955) 349 U.S. 458, 460, 75 S. Ct. 850. The remedy for an alleged taking was not litigated in the trial court precisely because Appellant chose not to do so. JSA pp. A1-A34. Similarly, the only reference to inverse condemnation in the Court of Appeal opinion is a one sen-

tence passing one at best at the end to "Appellant's final argument". JSA Supp. p. B15. This reference, again at best, is to the question of a taking, not damages. The mere citation of Supreme Court decisions in state court opinions does not demonstrate that the federal question was raised before it. *Osborne v. Clark* (1907) 204 U.S. 565, 567-568. In any event, briefs before state courts cannot be used to establish that a federal question was raised. *Live Oak Ass'n. v. Railroad Commission* (1926) 269 U.S. 354, 357-358. In effect, Appellant has raised the alleged federal damages question for the first time before this Court. This it is prohibited from doing.

III

THE DECISION OF THE CALIFORNIA COURTS HEREIN THAT THE CITY'S DENIAL OF A TIME EXTENSION DID NOT DEPRIVE APPELLANT OF ANY VESTED RIGHTS IS CONSISTENT WITH FEDERAL CONSTITUTIONAL DECISIONS ON DUE PROCESS AND EQUAL PROTECTION

Appellant's final assertion that jurisdiction should be granted because of denial of equal protection is meritless. Appellant offers no supporting federal authority whatever, aside from misstating the record.

This Court has frequently upheld land use regulations against equal protection challenges. *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 94 S. Ct. 1536 reaffirmed the impropriety of judicial interference with land use regulations. In the instant case, the trial court found that Appellant's request for a time extension was a request to change the Development Schedule of the PC zoning and thus a request for a rezoning or amendment to the PC zoning established by Ordinance No. 2224. JSA p. A32, FF 57. Therefore, the City acted in a legislative capacity regulating Appellant's land use through denying the requested

time extension. Applying the rational relationship test set out in *Belle Terre*, supra, at 8, and referring to the numerous factors relied on by City (JSA Supp. p. B8; JSA p. A31, FF 55), the Court of Appeal herein held that the denial was "neither unreasonable, arbitrary or discriminatory, nor does it deny Appellant due process or the equal protection of the laws". JSA Supp. p. B8. Referring to the only holding of this Court cited by Appellant (JS p. 24) as well as other authorities consistent with *Belle Terre*, supra, the Court of Appeal rejected the same arguments made herein by Appellant. JSA Supp. pp. B4-B8. In any event, Appellant's Jurisdictional Statement fails to make any showing of federal authority compelling granting of jurisdiction herein on this asserted ground.

CONCLUSION

For the reasons and on the authorities stated herein, City respectfully submits that the instant appeal be dismissed.

Dated: October 22, 1981

DIANE M. LEE
City Attorney
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A PROFESSIONAL CORPORATION
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By FRED CAPLOE
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(Appendices follow)

APPENDIX 1

Appellant's Complaint for Damages

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(415) 433-0440
Attorneys for Petitioner

In the Superior Court
for the
State of California
In and for the County of Santa Clara

No. P33070

Court House Plaza Company,
a limited partnership,
Plaintiff,

vs.

The City of Palo Alto, a municipal corporation, Stanley R. Norton, Byron D. Sher, Fred S. Eyerly, Roy L. Clay, Kirke W. Comstock, Scott T. Carey, John J. Berwald, Anne R. Witherspoon, John V. Beahrs, Councilmen, Peter F. Carpenter, Mary Gordon, William E. Green, Jay W. Mitchell, Frank J. Rack, Emily M. Renzel, Anne Steinberg, Planning Commissioners, Stan J. Nowicki, Chief Building Inspector, James O. Glanville, Zoning Administrator, Naphtali H. Knox, Director of Planning and Community Environment, Robert K. Booth, Jr., City Attorney, and Louis B. Green, Assistant City Attorney,
Defendants.

[Filed Sept. 22, 1977]

COMPLAINT FOR DAMAGES

Plaintiff alleges:

FIRST CAUSE OF ACTION FOR INDUCING BREACH OF CONTRACT AND FOR DESTROYING VESTED RIGHTS

1. Plaintiff, Court House Plaza Company, is a limited partnership pursuant to the provisions of Sections 15501 et seq. of the Corporations Code of the State of California and at all times herein mentioned was and now is a partnership doing business under the name of Court House Plaza Company, and has filed the certificate and published the notice of doing business under such name as required by sections 17910 et seq. of the Business and Professions Code of the State of California.

2. Defendant, the City of Palo Alto, is a municipal corporation under the laws of the State of California.

3. Defendants Stanley R. Norton, Byron D. Sher, Fred S. Eyerly, Roy L. Clay, Kirke W. Comstock, Scott T. Carey, John T. Berwald, Anne R. Witherspoon and John V. Beahrs were as of December 6, 1976 and prior thereto members of the City Council of the City of Palo Alto.

4. Defendants Peter F. Carpenter, Mary Gordon, William E. Green, Jay W. Mitchell, Frank J. Rack, Emily M. Renzel and Anne Steinberg were as of December 6, 1976 and prior thereto members of the Planning Commission of the City of Palo Alto.

5. Defendants Stan J. Nowicki, James O. Glanville, Naphtali H. Knox, Robert K. Booth, Jr. and Louis B. Green were as of December 6, 1976 and prior thereto respectively

Chief Building Inspector, Zoning Administrator, Director of Planning and Community Environment, City Attorney and Assistant City Attorney of the City of Palo Alto.

6. Plaintiff is the owner of a four-story office building located at 260 Sheridan Avenue, Palo Alto, California which was constructed in Phase 1 of a two-phase development project for a ten-story office building provided for in Ordinance No. 2224 passed by the City Council of the City of Palo Alto on December 28, 1964. Ordinance No. 2224 included the following development schedule:

> *Phase 1.* Start of construction of the 4-story office building on "Lot Area A", and the parking Garage on "Lot Area C" within two (2) years of Council approval.
>
> *Phase 2.* Start of construction of the 5th to and including the 10th story on "Lot Area A" and additional levels of the parking garage on "Lot Area C" by October 31, 1976.

7. Plaintiff commenced construction of the four-stories of Phase 1 of the ten-story office building within the two years provided in the development schedule and completed the same on or about August 1967 but did not commence construction of the parking garage within the two years provided in the development schedule at the request of the City of Palo Alto.

8. Plaintiff by construction of the four-stories of the ten-story office building in accordance with the 1961 Building Code of the City of Palo Alto obtained vested rights to construct the ten-story building provided for by Ordi-

nance No. 2224 in accordance with the 1961 Building Code because Plaintiff solely for the purpose of providing the capability of supporting the six additional stories incurred additional expenditures in connection with the first four stories of approximately $450,000.00 by incorporating therein in accordance with the 1961 Building Code including an interior smokeproof tower, back-to-back exit stairs, two additional elevator shafts, an elevator machinery room capable of receiving the elevator machinery for the two additional elevators to be placed in the two elevator shafts, electrical, water and sewer capabilities for the six-story addition, a foundation and structural steel in the four-story building capable of supporting the six-story addition and with the building set back on the land in accordance with the plans for a ten-story building.

9. Defendant City of Palo Alto by agreement with County of Santa Clara caused the County of Santa Clara to acquire by condemnation as of August 21, 1970 a portion of the parcel to be used for the construction of the permanent parking garage provided for in Ordinance 2224 and thereby made it impossible for plaintiff to thereafter construct the permanent parking garage.

10. Defendants delayed construction of Phase 1 and in addition delayed construction of Phase 2 by the above identified condemnation action by the County of Santa Clara, by another earlier condemnation action by the County of Santa Clara acquiring another of Plaintiff's parcels used for parking for a proposed expansion of the North County Court House and by causing unwarranted

delays in the issuance of use and building permits for both Phase 1 and Phase 2.

11. Plaintiff had planned to commence construction of Phase 2 as soon as the demand for office space in the area demonstrated a need for six additional floors of space. The demand for office space in the vicinity of the Plaintiff's proposed ten-story building was saturated for many years by the City of Palo Alto permitting the Dillingham Project, now Palo Alto Square, to proceed which placed two ten-story office buildings and other two-story office buildings on the market within a few blocks of Plaintiff's building at about the time when plans were being undertaken to add the six additional floors. The demand for office space in the vicinity of plaintiff's building did not improve sufficiently to warrant the construction of the six-story addition untl 1976.

12. Plaintiff for construction of the six additional floors to the building had complete architectural plans prepared for the six-story addition and purchased the structural steel and the additional elevators for the six-story addition at a cost including interest paid in excess of $600,000.00 and also obtained building and use permits for the six-story addition and thereby acquired additional vested rights to complete the ten-story building.

13. Plaintiff also obtained vested rights to provide the necessary parking for the ten-story building within 500 feet of the building and in connection therewith Plaintiff prepared parking plans for the necessary parking and submitted a zone change application for such parking.

14. Plaintiff in connection with the preparation of revised plans and specifications on the ten-story building to comply with the 1973 Building Code expended sums in excess of $20,000.00 for architectural and engineering fees and in connection presentations to the Planning Commission and the City Council expended legal fees in excess of $5,000.00.

15. Plaintiff in connection with parking studies to provide parking for the ten-story building and for parking plans submitted to the Planning Commission expended approximately $10,000.00.

16. Plaintiff prior to the expiration of the development schedule on October 31, 1976 submitted applications for use and building permits and for an interim building permit to permit construction of the six-story addition but defendants have refused to act on such applications and to this day have not issued use and building permits for the six-story addition.

17. Defendants by refusing to act on the applications for the use and building permits forced Plaintiff to seek an extension of time in the development schedule provided by Ordinance No. 2224 well knowing that such an extension of the development schedule would be turned down by the Planning Commission and the City Council of the City of Palo Alto.

18. Palo Alto Municipal Code 18.68 provides:

> For good cause shown by the property owner in writing, prior to the expiration of the original time schedule for the development, the planning commission, without a public hearing, may recommend a change or

extension of the time limits imposed by the development schedule. Upon receipt of the recommendation of the planning commission, the city council may change or extend the time limits imposed by the development schedule.

19. The Planning Commission of the City of Palo Alto on October 27, 1976 denied Plaintiff's request for an extension of the development schedule which was affirmed by the City Council on December 6, 1976.

20. Defendants cooperated and aided and abetted each other to carry out a common plan and to present a united front by obtaining a firm consensus to impose illegal and arbitrary requirements on Plaintiff's project commencing at least as early as October of 1972 and continuing through December 6, 1976 to make it as difficult as possible, if not impossible for Plaintiff to complete its project by erecting the additional six stories and providing the necessary parking.

21. Defendants cooperated and aided and abetted each other to carry out this common plan by refusing to issue use permits because of the alleged 14-foot height variation, even though this height variation had been found to be insubstantial by a previous City Council, refusing to issue a building permit before a use permit has been granted even though this has been done on this project on a previous occasion, refusing to issue a building permit on plans on which a building permit had previously been issued even though the plans complied with the 1961 Building Code and the 1970 Building Code, refusing to issue a building permit on plans which had been revised to comply with the 1973

Building Codes, refusing to issue an interim building to permit erection of steel for the six-story addition even though interim building permits had been issued in the past, refusing to issue a building permit before plans for the permanent parking had been approved although this had been done in the past on this project, refusing to commence plan checks on plans which had previously been approved, refusing to commence plan checks on plans submitted under the 1973 Building Code, refusing to permit the six-story addition to be completed in accordance with the 1961 Building Code even though the City Attorney had previously ruled that Plaintiff had vested rights in such a building built in accordance with the 1961 Building Code, and refusing to grant an extension of time in the development schedule for Plaintiff's P-C district even though on other P-C district requests for extensions of the development schedule had been routinely granted.

22. Plaintiff has suffered special damages as hereinabove set forth for the additional expenditures in the four-story building to provide the capability of supporting the six-story addition, expenditures in connection with the six-story addition including preparation of architectural plans, purchase of elevators and structural steel, revisions of plans and legal fees on presentations to Planning Commission and City Council and expenditures in connection providing the parking for the completed ten-story building in an amount in excess of $1,085,000.00 plus various other sums, the full nature and extent of which plaintiff does not have knowledge at this time, but prays leave to insert at the appropriate time.

23. Plaintiff has suffered general damages as hereinabove set forth for the loss of time and inconvenience of its general partner and limited partners and the partners in its predecessor general partnership, loss of profits from the existing four-story building, loss of profits from the six-story addition, loss of increased appreciation of four-story building, and loss of appreciation for six-story addition and the parking for the completed ten-story building and loss of future profits from the ten-story building and loss of depreciation from six-story addition and the parking structures or structures associated therewith in an amount in excess of $9,000,000.00 plus various other sums, the full nature and extent of which plaintiff does not have knowledge at this time, but prays leave to insert at the appropriate time.

SECOND CAUSE OF ACTION FOR INTERFERING WITH EXISTING CONTRACTUAL OBLIGATIONS TO DESTROY PRESENT BUSINESS OPPORTUNITIES AND ADVANTAGES

24. Plaintiff incorporates in this cause of action the allegations of paragraphs 1 through 23 of the first cause of action.

25. Defendants' actions and inactions complained of in paragraphs 1 through 23 have interfered with Plaintiff's existing contractual rights with the City of Palo Alto and have interfered with Plaintiff's present business opportunities and advantages by making it more difficult to increase the present rental income, by making it economically not feasible to provide additional elevator service for the existing four-story building and to provide improved park-

ing for the four-story building and by making less desirable the first-floor space with the large arcade than would be the case if six stories had been added to the four-story building.

26. Defendants' actions and inactions complained of in paragraphs 1 through 23 have interfered with Plaintiff's present business opportunities and advantages by depriving it of the opportunity of proceeding with the construction of the six-story addition during a time when construction financing and long-term financing have been more favorable than they have been for many years and during a time when there is a demand for additional office space in the vicinity of Plaintiff's Court House Plaza Building.

27. Defendants' actions and inactions complained of in paragraphs 1 through 19 have prevented Plaintiff from obtaining the benefits of large monetary investments already made in the present four-story building to accommodate the six-story addition and for the architectural plans, structural steel and the additional elevators for the six-story addition including additional rental income, depreciation and other benefits.

28. Defendants' actions and inactions complained of in paragraphs 1 through 23 have prevented Plaintiff from completing the six-story addition and from obtaining therefrom present rental income from the six-story addition and the additional present depreciation therefrom.

THIRD CAUSE OF ACTION FOR INTERFERING WITH EXISTING CONTRACTUAL OBLIGATIONS

TO DESTROY FUTURE BUSINESS OPPORTUNITIES AND ADVANTAGES

29. Plaintiff incorporates in this cause of action the allegations of paragraphs 1 through 28 of the first and second causes of action.

30. Defendants' actions and inactions complained of in paragraphs 1 through 28 have interfered with existing contractual obligations of the City of Palo Alto to prevent Plaintiff from completing its ten-story building and therefore have deprived Plaintiff of future increased rentals from the existing four-story building and particularly from the first floor by making it economically impossible to provide additional elevator service for the four-story building and to provide improved parking and by making the first floor much less desirable for tenants because of the failure to provide the additional building traffic which would be generated by the additional six floors.

31. Defendants' actions and inactions complained of in paragraphs 1 through 28 have deprived Plaintiff from the future rental income from the additional six floors and the future depreciation for such six added floors and the possible future rental income and future depreciation on the parking structure or structures associated therewith.

32. Defendants' actions and inactions complained of in paragraphs 1 through 28 have deprived Plaintiff of the benefit of future appreciation in value of the six-story addition and the associated parking structure or structures.

Wherefore, Plaintiff demands judgment for:

1. **Special damages of $1,085,000.00**
2. **General damages of $9,000,000.00**
3. **Costs and attorneys' fees**
4. **All other just relief.**

Cartwright, Sucherman,
Slobodin & Fowler, Inc.

By /s/ Robert E. Cartwright
Robert E. Cartwright, Esq.
Attorney for Plaintiff

VERIFICATION

I, the undersigned, say:

I am the General Partner of the Plaintiff in this action. I have read the Complaint and know its contents, and the same is true of my own knowledge, except those matters which are stated in it on my information and belief and as to those matters I believe it to be true.

Executed on this 22nd day of September, 1977 at Palo Alto, California.

I declare under penalty to perjury that the above is true and correct.

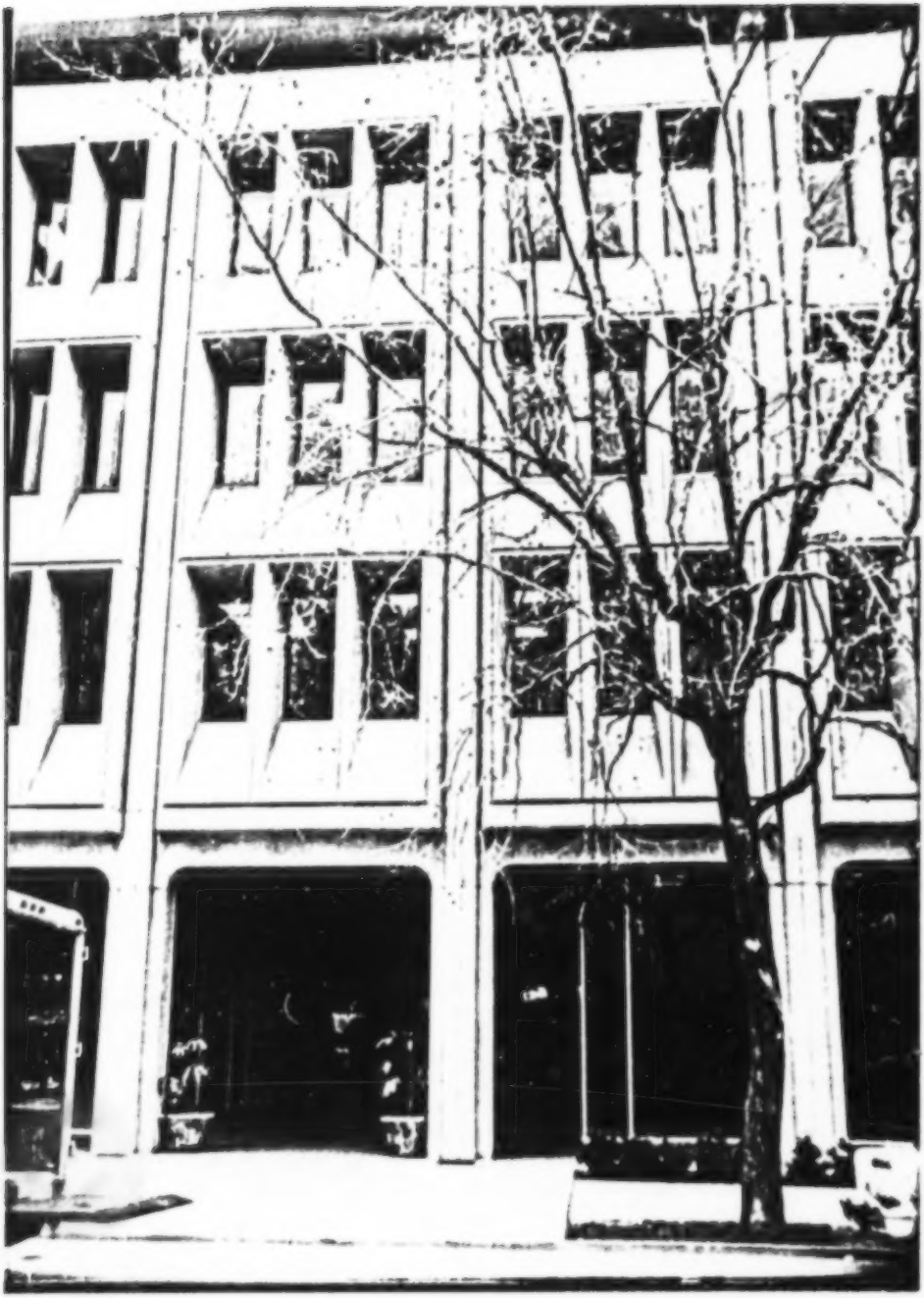
Court House Plaza Company,
Plaintiff

By /s/ HAROLD C. HOHBACH
Harold C. Hohbach,
General Partner



Photograph from Appellees' Trial Exhibit R. 71.

APPENDIX 3



Photograph from Appellees' Trial Exhibit R. 71.

Appellant's Reply Brief

No. 81-404

Office - Supreme Court, U.S.
FILED
NOV 16 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

COURT HOUSE PLAZA COMPANY,
Appellant,

v.

CITY OF PALO ALTO ET AL.,
Appellees.

On Appeal From The Supreme Court Of California

BRIEF OPPOSING MOTION TO DISMISS

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Attorneys for Appellant

November 1981

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No. 81-404

In the Supreme Court of the United States

OCTOBER TERM, 1981

COURT HOUSE PLAZA COMPANY,
Appellant,

v.

CITY OF PALO ALTO ET AL.,
Appellees.

On Appeal From The Supreme Court of California

BRIEF OPPOSING MOTION TO DISMISS

This is a brief on behalf of Appellant and property owner, Court House Plaza Company, opposing the motion to dismiss of Appellees, the City of Palo Alto, et al.

I. THE MOTION OF DISMISS MUST BE DENIED BECAUSE THERE HAS BEEN AN INVERSE CONDEMNATION

The City in its Motion to Dismiss seeks to have this Court dismiss the appeal because damages were not sought in this case. This contention is without merit. Appellant and property owner in its petition for writ of mandamus asserted that the appellees have denied appellant "the lawful use of its real property, have taken the same without compensation, have acted without due process, and in contravention of the laws of the Constitution of the State of California and the United States of America and contrary to the laws of the City of Palo Alto . . . " (CT58)[1]

Appellant thus presented the issue of inverse condemnation to the trial court through the allegations of its petition. The Court of Appeal, recognizing that appellant's claim sounded in inverse condemnation, addressed that issue at the end of its opinion

[1]Abbreviations used herein are: "JS- " (Jurisdictional Statement), "JSA- " (Appendix to Jurisdictional Statement), "JSA Supp.- " (Supplement to Appendix to Jurisdictional Statement), "CT- " (Clerk's Transcript in the California Court of Appeal), "Ex.- " (Trial Court Exhibit), "RT- " (Reporter's Transcript).

(JSA Supp. B15). But the Court of Appeal refused to find a "taking" because, in its view, appellant had suffered only a diminution in the value of its property. In doing so, the Court of Appeal failed to recognize that the City had taken not a portion of the property's value, but rather appellant's entire vested right in the six-story addition and thereby defeated appellant's investment-backed expectation in the complete ten-story building. Given the self-executing character of the Fifth Amendment, this Court may perceive in the decision below a denial of not only appellant's taking claim but also its constitutionally-mandated remedy of money damages.

In the pending action for damages the city may attempt to assert that the present case constitutes a collateral estoppel to appellant pursuing damages. If the decision of the Court of Appeal in this case is left standing, the outcome of the damage action is clear under the *Agins v. City of Tiburon* 24 Cal. 3d 266, 157 Cal. Rptr. 372 (1979) affirmed 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) case since there can be no inverse condemnation, there can be no damages. Therefore this case is ripe for a decision by this Court as to whether the State of California can preclude such a remedy under the California and U.S. Constitutions. To require appellant go through the time-consuming and expensive procedure to pursue the damage action to its obvious conclusion and then again appeal to this Court would be a waste of judicial time and effort. The principal issue is whether there has been an inverse condemnation of appellant's property.

II. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE ERRONEOUS AND UNSUPPORTABLE

Appellees in their Motion to Dismiss cite certain findings of fact. Many of the findings of fact are erroneous and without support in the facts. In addition, they often reflect arguments of the appellees. The findings also mix questions of fact and law. The findings were prepared by counsel for appellees and were

adopted almost verbatim by the trial court over the strenuous objection of appellant (CT 727) as being erroneous and not supported by the facts. Appellees now seek to bootstrap themselves by using their own findings for many of their propositions without citing any underlying facts to support the same.

Appellees accuse appellant of presenting a Jurisdictional Statement containing significant factual errors. Appellant has reread the Jurisdictional Statement and finds no factual errors therein. In its overzealous efforts to condone what appellees have done with respect to appellant's property rights, it is counsel for appellees who seems to be contorting the facts.

The facts as to what appellant did in connection with proceeding with Phase 2 are not in dispute. What is in dispute are the legal conclusions to be drawn from the activities of appellant in connection with Phase 2. This Court has reviewed findings of a state court "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas*, 274 U.S. 380, 385-386, 71 L. Ed. 1108 (1927). And see *Creswill v. Grand Lodge*, 225 U.S. 246, 261 (1912); *Sterling v. Constantin*, 53 S. Ct. 190, 287 U.S. 378, 398, 77 L. Ed. 375 (1932). In *Sterling v. Constantin*, the Court found that the right of the owner of petroleum-producing property to its enjoyment and use, subject to reasonable regulation by the state is protected by the due process clause of the Fourteenth Amendment. The Court stated that "when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the Federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of a Federal right."

III. THE CITY OF PALO ALTO HAS TAKEN PROPERTY OWNER'S RIGHTS FOR FLOORS FIVE THROUGH TEN

This case is unique in its federal questions because it raises for the first time whether vested rights can accrue to a developer of a vertically-phased high-rise building to construct the second phase, when the first phase has been constructed to accommodate the second phase.

A. *Property Owner Acquired a Vested Right to Complete the Ten-Story Building.*

The long line of authorities cited by property owner in its Jurisdictional Statement (JS-13) including *Atkinson v. Piper* 195 N.W. 544 (S. Ct. Wisc. 1923); *TransOceanic Oil Corp. v. Santa Barbara* 85 C.A. 2d 776, 194 P. 2d 148 (1948); *Herskovits v. Irwin* 299 Pa. 155, 148 A. 195 (1930); and *Glenel Realty Corp. v. Worthington* 164 N.Y.S. 2d 635 (1967) hold that property owner by construction of the four-story Phase 1 under a building permit to accommodate the additional six floors acquired a vested right to complete the ten-story building. In addition, the fabrication of the structural steel and elevators for the six-story addition for which a building permit did issue also vested property owner with the right to complete the ten-story building because on-site construction is not necessary. *Morgan v. County of San Diego* 19 C.A. 3d 636 (1971); *Pardee Construction Company v. California Coastal Commission* 95 C.A. 3d 471, 157 Cal. Rptr. 184 (1979) and other cases cited by appellant (JS-18).

Appellees attempt to distinguish the *Pardee* case on the ground that in that case the parties conceded that there were vested rights. This is a distinction without meaning. The facts in the present case show that vested rights should have been conceded by the City. In fact, in a letter of February 3, 1970 (see JSA-F.1), the City found that appellant had a vested right to complete the ten-story building with an interior smokeproof

tower. The smokeproof tower controversy which caused the letter to be written arose because of the application (Ex. 133) for a building permit for the six stories of Phase 2. The Building Inspector did issue the permit (Ex. 19) for floors five through ten with an interior smokeproof tower after the issuance of the letter. For the appellees to urge that this letter referred to a method of construction for an interior smokeshaft for the existing four-story building where none is required for a four-story building borders on the ludicrous.

In the *Pardee* case, the developer had completed the foundations of all 231 units in a 231 unit condominium complex under building permits prior to the effective date of the 1972 Coastal Act and obtained an exemption from the Act because it "had performed substantial work and incurred substantial liabilities in reliance upon the City permits authorizing construction of its entire condominium project." The developer constructed 152 of the units but stopped construction of the remaining 79 units due to slowing sales. The building permits for the 79 units expired. When the developer at a later time sought an exemption for the 1972 Coastal Act based on its vested rights, the State Commission held that developer's vested rights could not outlive the permit upon which they were based. The Court of Appeal disagreed, holding that there was neither statutory nor constitutional authority authorizing a State Commission to limit or deny a once-recognized vested-right basis for exemption. The Court of Appeal found that the vested right exemption once obtained is a "state matter controlled by constitutional principles," and that it was "not governed by municipal ordinances or policies." The Court of Appeal also stated:

> Thus there is a total lack of logical relationship between constitutional doctrines related to vested rights and municipal policies treating with time for, conditions of expiration of building permits.... The happenstances of municipal

administration cannot be conclusive on the constitutional law issue involved in loss of a vested right.

Property owner's construction of the first four floors of Phase 1 to accommodate the additional six floors was certainly a greater preparation than the pouring of foundations for condominium units.

Avco Community Developers Inc. v. South Coast Regional Commission 17 Cal. 3d 785, 122 Cal. Rptr. 810 (1976) supports appellant's contention that it acquired vested rights. Appellant, unlike the developer in *Avco*, obtained specific building permits. The development plan submitted by appellant for Ordinance No. 2224 included specific architectural drawings showing the location of the ten-story building on the site, its size, height and appearance as well as certain interior details to be built in two phases in accordance with demand (RT 54). A model (see Ex. 135 in App. 1 herein) showing the ten-story building and associated parking structure (RT 67) was shown to the City Council (Ex. 4, RT 64). In addition, the drawings (Ex. 146A) submitted along with the application (Ex. 146) for the building permit for the four floors of Phase 1 made it clear they were to provide the support for the additional six floors (RT 137-145). The first four floors were built under a building permit (Ex. 10) to such approved plans. Thereafter, a building permit (Ex. 19) issued on specific plans (Ex. 133A) submitted along with an application (Ex. 133) for a building permit for the remaining six floors of Phase 2. Fifty percent of the structural steel and substantially all of the elevators were fabricated after issuance of the building permit for Phase 2 (RT 482, Ex. 265A). Under the law of vested rights as expressed by *Avco*, appellant acquired a vested right to complete the ten-story building because it acquired building permits to construct a specific type of building and thereafter expended nearly $1,000,000 in reliance on those permits for Phase 2.

In *Donohue Const. Co. v. Montgomery City Council* 567 F. 2d 603 (4th Cir. 1977) no work had been done on a building permit. Developer filed a building permit application for a fourteen-story office building which cut across existing plat lines necessitating resubdividing of the property. The subdivision plan was disapproved with the chief reason being the unavailability of adequate sewer service arising from a sewer moratorium imposed by the State of Maryland. The court found that this denial did not constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution. There was no construction under a building permit as in the present case.

In *City of Ann Arbor v. Northwest Park Const. Corp.* 280 F. 2d 212 (6th Cir. 1960) developer had done some preparatory work on the property and expended funds for pla[illegible] r a shopping center in reliance upon prior zoning of the property for commercial use. The Court held that this preparatory activity gave no vested right to commercial zoning. Again, there was no work done under a building permit for the building or buildings to be permanently constructed as in the present case.

These and the other cases cited by appellees certainly are no authority that the appellant did not acquire vested rights by construction performed under building permits for both Phases 1 and 2. In none of these cases was work done under a building permit for a specific building.

B. *The Incurrence of Obligations Prior to Issuance of a Building Permit Does Not Defeat a Vested Right Claim Where the Building Permit Did Issue.*

Appellees urge that appellant had "fully obligated itself to pay for Phase 2 development costs . . . prior to being issued a building permit . . . (almost five months later) in a finding of fact prepared by appellees and signed by the Trial Court (JSA-24). Appellant submits that whether appellant obligated itself before a building permit issued is immaterial as long as a building permit

did issue as it did on February 16, 1970 (Ex. 19). As soon as the building permit (Ex. 19) issued, appellant's work on Phase 2 vested to give appellant the right to complete the six-story addition. *Kissinger v. City of Los Angeles* 161 C.A. 2d 327 P. 2d 210 (1955); *COS Corp. v. City of Evanston* 27 Ill. 2d 570, 190 N.E. 2d 364 (1963); *Glenel Realty Corp. v. Worthington* 164 N.Y.S. 2d 635 (1967); *Lefrak Forest Hills Corp. v. Galvin* 40 A.D. 2d 211, 338 N.Y.S. 2d 932 (1972).

Appellees have cited no authority, and appellant submits that there is none, which holds that work done after a building permit has issued cannot give rise to vested rights because the obligation to pay for the same was undertaken before issuance of the building permit. In addition neither the facts nor the law support appellees' contention that appellant had fully obligated itself by a letter of September 30, 1968 (Ex. R-40, see App. 3 herein). The letter merely authorizes the building contractor to proceed with the placement of subcontracts. This letter at best is only a unilateral authorization to proceed. No formal contract for Phase 2 was entered into by appellant and the building contractor (see Ex. R-38). Without such contracts the building contractor's recovery for work done on reliance on the letter of instruction at best would be in quantum meruit. See 3 Corbin, Contracts, 1960 ed. §§590, 593-595, fn. 22 citing *Peerless Glass Co. v. Pacific etc. Co.* 121 Cal. 641, 647, 54 P. 101. A stop work order by appellant would have required the building contractor to stop all further work and recovery could only be had for the work performed up to the date of the stop work order. *Early v. Santa Clara Broadcasting Co.* 211 C.A. 2d 367; 27 Cal. Rptr. 212 (1962). Appellant had no agreements with the fabricators for the steel and elevators, and the building contractor had no final agreements with the fabricators, but only an interim letter agreement (Ex. R-66) dated October 3, 1969 with the steel fabricator and a similar agreement (Ex. R-44) dated January 6, 1970 with the elevator apparatus fabricator.

Thus it can be seen that appellant had not, as of September 30, 1969, fully obligated itself for the purchase price, which was unknown, for the fabrication of the steel and elevators. Obligations to pay for 50% of the steel and substantially all of the elevators were incurred after February 16, 1970 when the building permit did issue (RT 482, Ex. 265A). Because appellant could have issued a stop work order at any time it knew that a building permit would not issue and reduce its obligations, it follows that work done after February 16, 1970 was in reliance on the building permit.

C. *Property Owner Has no Beneficial Use of the Monies Expended in Phases 1 and 2 for the Additional Six Stories.*

Appellee asserts that appellant has had a reasonable beneficial use of its property and cites *Penn Central Transp. Co. v. City of New York* 438 U.S. 104. This is untrue. Property owner has received no beneficial use of the nearly $1,000,000 expended for Phase 2.

In *Penn Central*, the terminal's present foundation included columns which were built into it for the express purpose of supporting a twenty-story office tower above the terminal. The terminal opened in 1913 but the 20-story office tower was never built. In 1968 an application was made to permit construction of either a 55-story or a 53-story office building over the terminal. Both proposals were denied on the ground that a large office tower would overwhelm the terminal. This court held that this denial was not a taking of the property owner's property. The issue was whether the property owner had the right to build a much larger office building under existing zoning for which there had been no work done under a building permit. Property owner in the present case merely seeks to build a ten-story building which is the same building always contemplated and approved by Ordinance No. 2224. Construction took place under building permits for both Phases 1 and 2.

In *Penn Central*, the property owner was able to enjoy its dis-

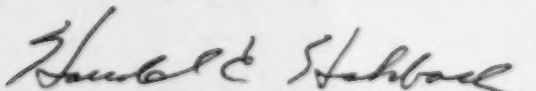
tinct investment-backed expectations concerning the land for the past 65 years. On the other hand, property owner in the present case has not been able to enjoy its distinct investment-backed expectations, a ten-story office building with associated parking as reflected by the model (Ex. 135, App. 1 herein) and approved in Ordinance No. 2224.

IV. CONCLUSION

This case presents squarely the issue of whether the State of California, in addition to holding that there can be no inverse condemnation in California and that no monetary damages can be awarded even when a taking did occur, can destroy the last vestiges of vested rights in California by holding that even work done under a building permit for a specific building will not give the property owner vested rights. Without such rights appellant could not obtain either the equitable remedies available under state law, as an alternative to the money remedy mandated by the Fifth Amendment. The Supreme Court of New Hampshire has rejected the approach of California in *Agins* as being contrary to its well established law and "in violation of the Constitution of the United States." *Burrows v. City of Keene* 432 A. 2d 15 (1981). Since a "taking" has occurred, the Court should order that the appellees either issue the necessary permits to permit appellant to complete the ten-story building with associated parking or in the alternative award appropriate monetary damages for inverse condemnation.

For the foregoing reasons, the Motion to Dismiss should be denied and jurisdiction should be noted.

Respectfully submitted,
FLEHR, HOHBACH, TEST, ALBRITTON & HERBERT

By 

Harold C. Hohbach
Counsel for Appellant



Photograph of Model of Ten-story Building and Parking Structure (PX. 135)



EX. R-71

APPENDIX 3



CALIFORNIA LANDS INVESTMENT COMPANY

[illegible] AMERICAN AVENUE • PALO ALTO • CALIF. 94306 • 321-[illegible]

W. G. DUNN

September 30, 1969

Mr. Roy Peglau
Johnson & Mape Construction Company
125 Independence Drive
Menlo Park, California

Dear Roy:

Pursuant to our telephone conversation today, this letter will authorize you to immediately commence placement of all subcontracts for the construction of the six-story building addition to the California Lands Building. The completion of these facilities is urgent and I request that you do all possible to expedite the scheduling and procurement so that we may be assured of completion no later than July 1, 1970.

Very truly yours,

CALIFORNIA LANDS BUILDING COMPANY

W. G. DUNN
Managing General Partner

WGD:bc

JOB 6.5

[illegible] • REAL ESTATE • INDUSTRIAL • INVESTMENT • INCOME • RESIDENTIAL